

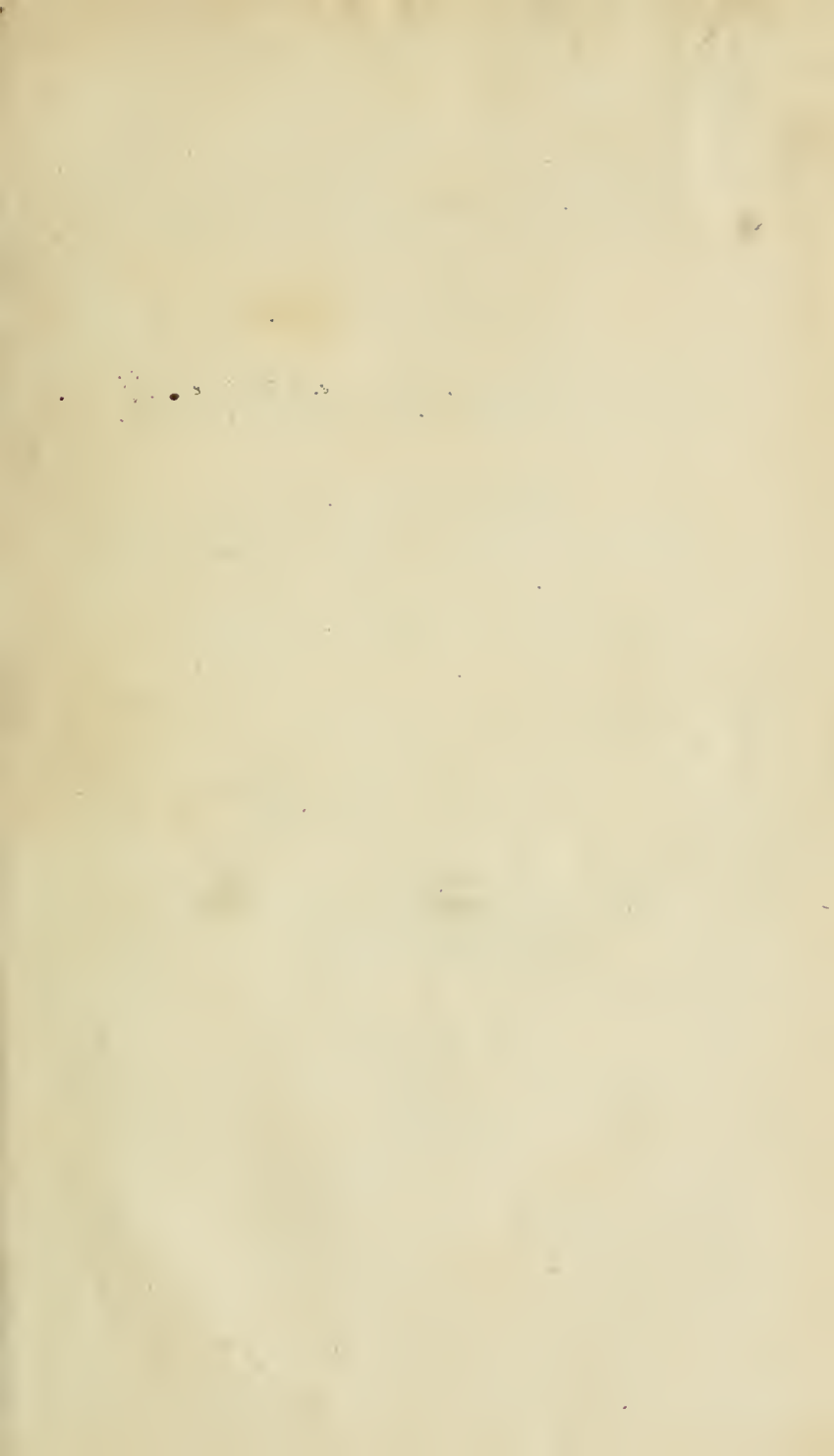


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A

First Ed.

SERIES OF LETTERS

TO THE

Right Hon. *Edmund Burke*;

IN WHICH ARE CONTAINED

E N Q U I R I E S

INTO THE

CONSTITUTIONAL EXISTENCE

OF

A N I M P E A C H M E N T

AGAINST

*MR. HASTINGS.*

---

By G. HARDINGE, Esq. M.P.

---

L O N D O N :

PRINTED FOR T. CADELL, IN THE STRAND.

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## LETTER THE FIRST.

Vereor committere, ut non bene provisâ et diligenter explorata PRINCIPIA ponantur.

Cic. *de Leg.*

S I R,

THOUGH I have not the honor of your personal acquaintance, and am not of consequence enough to interest your attention, I take the liberty of addressing you in print, upon a constitutional subject, which has of late occupied, in serious argument, those who have the *will* and the *power* to reason upon it without prejudice.

To this mode of laying my thoughts before so enlightened an age, I am not prompted by the arrogant and wild conception, that I could be *read*, any more than I could be *heard*, as *your* antagonist; but I have recourse to it, because the habits of guard over expression that may offend, (a guard almost inseparable from such a form of address,) will restrain any sudden impulse of the writer to that *polemical zeal*, against which men of sober minds are prejudiced in such a degree, as to refuse even truth, if it should pass through so disturbed a channel: But suffer me

† B

to

SL1TP/SC David Bickes to H. 107467 Dec 1989 246-77

to add, that, being a zealous admirer of your eminent fame and worth, I shall, with more diffidence upon that account, offer *my* opinions to the public, where I feel them to be discredited, as being the reverse of those which *you* have entertained.

I, Sir, am one of the few, who thought it would not have degraded, or weakened, any inquisitorial rights which the elected representatives of the people are authorised by the constitution to enforce, if the *committee* had *enquired* into the law, as it stood upon record in the journals \* of parliament, before they affirmed, “ *That an impeachment, after evidence has been heard upon it in one parliament, may be continued in the next, from the point at which it stood when the former parliament was closed by a dissolution;*” which, as you explained it, is the view and spirit of their vote upon the 23d of December 1790.

But as the debate on this critical subject was continued for three days, and produced a very able discussion of all the various grounds upon which that vote could be supported, I shall con-

\* The house of lords have instituted a committee for the examination of precedents, though informed by the commons, not of their *judicial vote*, but of their *perfect readiness* to carry on the impeachment; which readiness indicates *their* sense of the law to be, that an impeachment is depending.

sider it, as if the examination of precedents had been directed, and had brought forward, in a parliamentary form, the materials to which the argument has referred.

It is not in a technical, or contracted view of the subject, that I lament this resolution, but as tending to consequences that strike at the root of justice, and freedom.

If it could end with Mr. Hastings, I should say, “ *Felices errore suo !*” For I am still of opinion, that *political* honor, which is always *political* wisdom, demands the further trial of that culprit.

Nor would I perhaps lament this resolution as a mere precedent of the particular doctrine (though *questionable* at least, upon topics of convenience and of justice), if I had not seen it accompanied, and supported by topics of reasoning, which appear to me rather calculated, in their nature (though not in the view of those who made use of them) to be the engines of despotism, than of liberty, well understood.

I allude, Sir, to those *general principles* which have been either directly asserted, or insinuated, and fatally assumed.

If *they* are established, there is an end of that balance between the rights of the Sovereign and

those of the people, which is the vital spirit of this Constitution ; for, by *these* principles, all the rights of the Executive Power, as well as those of the other Estates, may acquire an indefeasible character ; *State Necessity*, the tyrant's plea, may again be made the artful pretence for every oppression by either of these rival powers, but with an advantage-ground of *Parliamentary law*.

I have reflected seriously upon these principles, and though some of them are popular in their sound, they carry no weight, in my estimation, but of danger to the government in which I was born, and whose constitutional powers I have revered, because I believed them to be those of a check, formed by jealous claims, not only between those who govern and those who are governed, but, in the same degree, between the several orders of that government, with a reference to each other, as their antagonist, and competitor.

- I. “ *That what is necessary to the uncontrouled  
“ and universal effect of a Constitutional Right,  
“ is therefore a part of it.*”

Here no line is drawn, or attempted ; and, if there is none, it leads to endless confusion.

For example, who shall tell me, that if the Right of Impeachment is absolute, and carries with



with it all that is necessary to its unlimited perfection, the accuser is, or can be, excluded from the Court who are to sit upon his culprit, while they are debating, and even determining, the various points of law that arise? Who shall tell me, that he can have no power to effectuate the continued and persevering attendance of that Court? That he has no right of imprisonment\*, or of bail; or of ensuring their continuance, when directed by the Lords? That he may *demand Judgment*, but has no legal power to *demand the execution* of it?

But let us pursue this captivating sentiment into other constitutional rights.

It is the right of the Commons to enjoy unlimited freedom in debate; but is it a part of that right, that no man shall be turned out of an office held at the King's pleasure, for his vote in Parliament; or, that no placeman can have a seat?

I give no opinion of my own upon the famous question,—Whether incapacity of return to Parliament arose from expulsion, and gave to the candidate a seat in the House, whom *three*, out

\* The Lords would not commit *Lord Clarendon* in 1667, nor this *Earl of Danby*, at the first requisition of the Commons, because the offence *was not* high treason, though called by that name.

of *three thousand*, electors might have nominated?—But this, at least, will be remembered—that it was a point of difficulty; that some of the best *Whigs* in England (and yourself in particular) insisted upon the right of obtruding the candidate on those who had refused, and ejected him; that a *Resolution*, affirming the minority of the votes to give the seat, is expunged from the Journals, which (as I agree with a very eloquent and able Statesman) does not *affirm* the law to be otherwise, but certainly intimates an *opinion* that it is, and an opinion of as enlightened a House of Commons as ever sat: Yet if the House could expel, was it not essential to the uncontroled and absolute right of expulsion, that it should bar the door against that same individual, in his new shape of a candidate returned immediately after this mark had been set upon him? Was it not essential to the right, as attracting to it all its necessary advantages, that no peevish, and captious warfare should proceed between the Electors and the House of Commons, by the repeated re-election and refusal of the obnoxious candidate; but that any competitor who had a single vote, should be received, upon the established principle, that a candidate ineligible is as no candidate? And what a monster of absurdity it is, that a Member of Parliament, expelled for the worst offences that can disgrace a man, may  
be

be eligible,—may sit by force, upon the return of that writ which declares the vacancy arising from his expulsion! But how were those topics of reasoning met, and answered by the eloquent, and constitutional arguments \* which you, and your friends, adopted with success? I will not impair them by attempting to do them justice; but I will only insist, that, if *they* were found, they refute that principle which I am now endeavouring to convict of error, and of danger to the government.

In all these, and a thousand other exigencies, of a similar nature, the constitution of this mixed government looks on both sides, and would rather want a part of its object, or of the means by which it can be obtained, than give to another party in the contest a right which is not established by usage, or principles of law. Is it not *essential* to the *uncontrouled effect* of the king's prerogative in declaring war, but is it *a part* of this prerogative, that he should find in his public revenue, or obtain by levies

\* The question is admirably put, in a mere statement of the *fact*, by the writer of *Thoughts upon the causes of the present discontents*. “The electors of Middlesex chose a person whom the house of commons had voted incapable, and the house of commons had taken in a member whom the electors of Middlesex had *not* chosen.” They declared, “that the true legal sense of the county was contained in the minority, and might, on a resistance to a vote of incapacity, be contained in *any* minority.”

upon the people, an adequate establishment of naval, and military force? Can he touch one shilling of the nation's purse, if the commons tell him he shall have no supplies? Many other admitted prerogatives are made nugatory by the opposition of constitutional difficulties, indispensable to that vigilant suspicion which is entertained against the abuse of right \*.

II. “ *That no right of the sovereign can by its abuse impair the effect of a right which the commons enjoy.*”

This principle cannot be illustrated with more advantage than in the case before us, to which it has been applied with such captivating talents, and powerful impression, by the most eloquent of men. The *substance* of the argument is upon a level to homelier capacities; and may be described even by me.

It has been said — “ That impeachment is a public accusation by all the commons of England against a delinquent of state; whom the law, in its regular course of justice, cannot reach with effect; that most of all, it is pointed against men of high authority, rank,

\* Mr. Paine, in his “ Rehearsal” (of a new constitution for Great Britain) has “ *elevated, and surprized*” us with a discovery, “ that in mixed governments no responsibility can exist.” — The charm that binds this agreeable paradox, is a very simple one; he assumes *universal corruption* as the secret mover of the whole machine. — *Rights of Man*, p. 153.

“ and power; that in this view it is, and means  
 “ to be, a check upon the abuse of Royal favor  
 “ and confidence by wicked Ministers; that it  
 “ gives energy to that wholesome fiction of the  
 “ Law which exempts the King from blame,  
 “ for the purpose of disabling him to shift the  
 “ entire odium upon himself, and weaken the  
 “ terror of it against his advisers. If they are,  
 “ in truth, slaves to him, the Constitution  
 “ forces them to be responsible for that servility,  
 “ by calling it *advice*, in order to punish the  
 “ guilt, and avert the mischief. But if the  
 “ King dissolve the Parliament by his prero-  
 “ gative, to save a justly execrated Minister  
 “ from Impeachment, it is no longer a terror  
 “ to the King, or his co-adjutors in the govern-  
 “ ment; and as there is no other appeal, but an  
 “ appeal to the sword, they have perfect impu-  
 “ nity, or the nation is thrown into a civil war:  
 “ —So thought, felt, and acted our ancestors in  
 “ the *Earl of Danby's* memorable case, when  
 “ they rejected the King's pardon as an objection,  
 “ *in limine*, to their Impeachment. The case in  
 “ the terms of it was new; the right of pardon,  
 “ taken in the abstract, was unlimited; but *this*  
 “ limitation of it, their public spirit challenged  
 “ and secured. Upon the same principles,  
 “ though in a different shape of them, but no  
 “ less important, the public spirit of these times

“ is called upon to assert, that no *dissolution*  
 “ of Parliament shall save a culprit under an  
 “ Impeachment from the continuance of his  
 “ trial; because vain, and impotent would be  
 “ the benefit of disabling his plea, ‘ that he was  
 “ pardoned,’ if the King should intercept the  
 “ course of justice, by terminating that of trial,  
 “ either at the moment before its regular end  
 “ by Judgment, or at any other period of the  
 “ evidence, when he should think his favorite  
 “ most endangered.”

This argument, (and I have done it all the  
 justice I *could*,) if it be a little closely examined,  
 will prove the danger of leaving those bounda-  
 ries which the Constitution has formed against  
*every* encroachment.

If the reasoning is correct, and sound, it can-  
 not stop at the continuance of an Impeachment  
 after a *dissolution* of the Legislature, but must  
 reach and cut off the King’s right of pardoning  
 the sentence; a right which is, it seems, at this  
 hour, “ denied him by all the *Whigs*, and given  
 “ to him by all the *Tories* ;” according to a  
 whimsical note in *De Lolme’s* very ingenious  
 Essay upon our Constitution \*: Yet I don’t  
 recollect that it was controverted by you, or any

\* It is controverted by *Williams*, as counsel for *Fitzharris*,  
 but upon strained analogies between *Impeachment* and  
*Appeal*.



of your able supporters, upon the subject of this Impeachment ; but I *do* recollect that it was acted upon, in the case of the Impeached Rebel Peers, by King *George the First* ; and that it is represented by Mr. *Justice Blackstone*, a new favorite of the *Whigs*, to be a point clear of doubt.

The *Right of making Peers* for the very purpose of securing the culprit who is impeached, may, upon principles equally cogent, be denied ; and a case may be imagined, which heightens the general mischief resulting from that new Peerage ; let us imagine the King, with such a purpose, to make those very Commoners, who had set their face against the Impeachment, Peers of Great Britain, the day before trial ; a mischief that is not quite visionary, for it has been felt ; and the Commons actually voted in 1640, That Peers, taken from the House of Commons, could not vote upon the Impeachment, because they were still accusers, and bound as parties : But will any sober man justify that vote, or give it the term of *privilege*—a term so familiar of late, and so misunderstood ?

It was observed by an acute, and powerful disputant, “ That it was not fair to argue in  
 “ support of a dangerous power, as being legal,  
 “ from the admitted legality of other powers,  
 “ which, if abused, might also be dangerous.”

But surely it is fair and sound reasoning, against an argument, which, from the danger of a power in its effect upon rights confessed, infers, that it has no legal existence,—to shew, that other powers, residing in the same part of the government, admitted on all hands to exist, may yet, by their abuse, injure the very same rights.

In answer to a supposed history of the fact, that the King's right of pardon was refused by the Commons, where it was attempted in opposition to the very outset of the Impeachment, I would first ask, if it is necessary, that because our ancestors made a new, and a very wholesome law, but in a most irregular shape, through the channel of powers usurped in a party-conflict, and which at last required the guarantee of the Legislature, *we* are therefore to assert, as a rule binding *us*, and binding the House of Peers, another proposition, which has no principle, or colour for it in the Law of Parliament?

But the *fact* respecting this pardon has been misconceived; and, as every point of it may illustrate the immediate subject before us, I shall take the liberty of requesting a particular attention to it \* *here*, though it should rather form

\* Before it was pleaded, the *Chancellor* (afterwards *Lord Nottingham*) had thrown it upon the King, as a personal act  
of

form a part of another and future discussion.

The pardon was pleaded in the court which can alone receive, and alone determine, every such plea,—that is, in the house of lords. Either it was the right, and the duty of the lords to give judgment upon that plea, or there is no point of law judicially before them, upon which they are to determine for themselves. Yet mark, I entreat you, the conduct of those whom you have represented as models worthy of our imitation: Having understood, that, upon receiving this plea, the lords had *committed the offence* of appointing a day upon which it was to be argued, they affirm *judicially*, by a vote of their own, the pardon to be illegal, and “ *therefore demand judgment accordingly:*” In other words, they dictate what the judgment shall be: But they do more; for they vote (9th May 1679), that whoever shall presume to maintain the validity of this pardon before the lords, without *their* leave, shall be accounted a betrayer of the liberties of the house of commons:—  
 “ *Itaque per paucis adversantibus omnia quæ ne*  
 “ *per populum, sine seditione, se assequi posse arbi-*

of his own; with a time-serving spirit, and a double treachery, which, in other times, would have justly irritated the commons against him; but his evidence was convenient.

“ *trabantur, per senatum consecuti sunt* \*.”— They had, with a judicial tone, affirmed the illegality of the pardon, in a vote the 5th May 1679 †; and had stated the same *judgment*, in the *resolution* for an address to the king, 24th March 1678. At a conference, after all these measures had been adopted, they tell the lords, what the pardon is, which is then before them; describe it, as being a calumny upon the king, *illegal*, and an obstruction to justice: Yet, in this very conference, they “ *admit* (re-  
“ *luctant evidence is always the best*), that *any*  
“ *change of judicature in parliament is of per-*  
“ *nicious consequence to the king, and the*  
“ *people.*”

The pardon was never judicially *declared* by the lords to be illegal; a dispute arose concerning the right of the bishops to give judgment upon that plea, and the parliament was dissolved.

\* Cicero, Epist. ad Fam.

† Two things are not a little memorable in their enquiries preliminary to this vote, enquiries instituted upon the 28th of April 1679; the first is, that a committee *examine precedents*; and the second, that, relying upon the *negative usage*, they report singly the fact of *no such pardon* having been ever issued—and this, forms the basis of their subsequent vote.

From this, which is an accurate statement of the fact as it was left at the dissolution of that Parliament, what can be more evident, than *first*, that in affirming the pardon to be illegal, “ and “ *therefore* demanding Judgment *accordingly*,” before the culprit was *heard* by the Court, these public inquisitors and accusers usurped a *judicial* character—became Judges in their own cause—and reduced the House of Peers into the mere instruments of their will?—*Next*, that in disabling any “ *Commoner*” (friend, or advocate) without *their* leave, to argue in support of this plea, they were guilty of a most cruel oppression?—But is it less clear, that whatever *sense*, and *policy*, may be found in disabling such a pardon, there was not a colour of *Law* for the disability; and that no precedents could help them beyond the *negative proposition*, that no such pardon had in fact issued? which *negative usage*; you, Sir, and your supporters, rejected the other day with scorn, as no advantage at all to the point made by those who represented the impeachment of Mr. Hastings to be at an end. It was lately urged by a most able, though young debater, who is of our profession, “ that what happened in this case of “ the pardon, was a decided precedent of that “ common sense, and public spirit which must “ for ever challenge the complete *effect* of an “ Impeachment, as well as the *name* of it.” He added, “ that what the Commons voted at this “ period, was *recognized* as Law by an Act of “ Parliament at the *Revolution*.”

In the first place, nothing is more clear than that the Act in question passed many years *after* the Revolution (in the 12th of *William III.*); and is, of itself, a complete evidence *against* the supposed legality of the doctrine affirmed by that vote: For it is a *new* Law, and it is *not* a *declaratory* one. But there is a very material fact, which never has been once noticed in the debate; and it is, that *at the Revolution*, when a laudable anxiety was exerted for the *declaration* of all essential and *legal* claims, affecting the King's prerogative, and liberties of the subject, a Committee who prepared heads for the *Declaration of Rights*, had made this, one of them:—  
 “ *No pardon to be pleadable to an Impeachment*†;” but, “ *for divers, and weighty reasons*, they omitted it in the *Declaration* \* itself:” Nor is it either in the *Bill of Rights*, or in the *Bill of Indemnity*. Indeed, if the words had stood, they would have pointed rather at a *new*, than a *declaratory* Law; especially as the Report had separated this article into a different class from that of powers which it affirms to be illegal. The Commons took the hint from their Committee, and would not risk, in the *Declaration of Rights*, their own *judicial* oracle against the *legality* of a pardon, as pleadable to an Impeachment;—which oracle *they* must therefore have considered as a *fiction*, though salutary, and conve-

† 2d Feb. 1688.—The article is adopted by the House, for under it is written—“ *Agreed.*”

\* As they inform the House, themselves, in a second Report, 7th February 1688.



nient. The commons, though for a time averse to the only expedient that remained, that of a *new law*, had recourse to it in the end, and thus admitted, that grounds of *policy* injurious to the established right of the sovereign, could not be received by the good sense of the constitution as grounds of *law*, till the legislature had enacted them.

Sometimes, however, the question was a little shifted the other day; for it was put thus—(but it was a distinction without a difference)  
 “ Let the king still have a right of dissolution  
 “ *uncontrouled*, but let the right of impeachment be equally *uncontrouled*. The dissolution of parliament does not, of necessity, mark  
 “ the termination of an impeachment, and the  
 “ two rights would not clash in the least, unless  
 “ this extravagant effect were given to the  
 “ king’s prerogative by a side-wind, an effect  
 “ not essential to it, and which is never to be  
 “ supposed a part of its view.” This begs the whole question upon the end of an impeachment, as *resulting* from the end of a parliament\*.

The

\* But why stop at the continuance of an impeachment, in the teeth of a *dissolution*? Why not refuse *the right of dissolution*, or even of *prorogation*, *pending an impeachment*? Will any man tell me, that both of them are not injurious to

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The next and *third* principle gives a death's wound, in my opinion, to that stability of rule which is the safe-guard of us all against any abuse of power, but most of all in criminal proceedings.

III. "*That a more liberal mode of reasoning is*  
*" necessary upon CONSTITUTIONAL principles*  
*" of LAW, with a political view to their im-*  
*" portance, and particularly against offenders*  
*" of State."*

The perfection of rule is, that it looks more at the uniformity of justice, than at the policy and spur of redress to a particular mischief.—No court in this mild government thinks it humiliating or dangerous, to give the lowest or the highest culprit an equal share of its presump-

the right of the commons, as public accusers? One of them shifts the accuser, and may convert him into a partisan for the culprit; the other may disarm the evidence by delay, or tire out the accuser: It is true the king must have a parliament again in three years;—but three years form an interval much too long for the safety of an impeachment.—Indeed, I confess, it has always appeared a very inadequate provision for the liberties of the subject, that, as the law was framed in *king William's* reign, the king is *now* able to suspend a parliament for any time short of three years; nor does it strike me as a law that has enacted the *Bill of Rights*, in that part of it which had stipulated, that parliaments were to be held *frequently*.

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tions in favor of innocence;—of its jealousy against evidence of guilt;—of its guard over all the essential forms, and barriers of justice, in the *mode* of reaching his fortune, his character, his freedom, or his life.

I know it has been often contended, that when the legislature assumes a judicial character for the safety of the public, it may dispense with judicial rules, and (as it was professed in the *Earl of Stafford's* attainder) “ that he, “ who, deserving to die, suffers by an act of the “ whole government in its parliamentary form, “ has a just fate, though rules and principles “ of established law, either in the evidence or “ description of his guilt, may have been “ violated.”

But, at least where both houses act in their divided and several functions of accuser and judge against any individual, we are no longer free, if the rule can be relaxed, or strained, or invented, or denied, as the importance of the *political* object may suggest.

The sword of this calamity hangs over us.

IV. CONSTITUTIONAL RIGHTS *have less of rule in them, than rights of a less interesting nature, and may acquire more or less weight from the exigencies of political convenience, to which they are applied.*

If *Constitutional Rights* could be thus measured, all distinctions between future policy and existing rule would be lost, and the good faith of public security would be shaken to the root; every link of that chain which unites the various and rival powers of government would be endangered, and we should expose this beautiful system, either to the desultory hand of caprice (which is perhaps of all tyrannies the worst), or to the casual impulse of party-violence.

There is nothing more delicate, than how to adjust, and limit this argument of *convenience*; when it is pressed in aid, as an evidence of *right*. Where there is a reasonable doubt, which of two opposite rights can prevail in point of law, the topic of *convenience* may determine it; but when there is mutual inconvenience, and the right is clear upon one side, but very disputable on the other, it never can, without infinite peril, be weakened in its effect by the discussion of more or less inconvenience, as between the right which is clear, and that which is disputable.

The

The *inexpediency*, ancient, as well as modern, for it must be so argued, of ending an impeachment by the dissolution of parliament, has been stated as being universal and clear of doubt. If this were true, it would not shake the legal consequences of an established right. But if that view of the subject is pursued, it will appear, that many reasons of *convenience*, and of *justice*, may be adduced in support of a legal doctrine, which appears to be so indisputable, that no evidence of impolicy resulting from it would move the rock upon which it stands. I have said, that in treating the subject of this *expediency*, we must in part carry it back to ancient periods, and especially to those in which the right was first assumed. For in construing an ancient right, or principle of law, the policy of them, when they *were* ancient, is a good and sound argument in their favor, as binding rules, till the legislature takes off the fetter; though, by subsequent laws, that policy may be weakened or destroyed.

Let us then first imagine the interval of three or four years:—I am here going back to early periods, because I am aware, that, by an act of king *William*, a parliament is now to be called  
within

within three years; but I have a right, upon such an enquiry, to look back at the interval of more than *seven years* between the parliament that was dissolved in 1515, and the next;—of more than *five and a half*, between the parliament that was dissolved 18th March 1580, and the new one;—of more than *four and a half*, between that which had a similar fate upon the 20th March 1588, and the succeeding one;—of more than *five and a half*, in king *James's* reign, between the parliament that ended 1st June 1614, and the next;—but above all, of *twelve* years in king *Charles's* reign, before the civil war\*.

Let us imagine all the witnesses dead whom the culprit was to have called in his further defence; let us put the case of a *dissolution* at the point of cross-examining an important witness for the accuser—his evidence has made its impression—the court is at an end, for a time at least—the interval is long—and the witness dies.

\* In *Streater's case*, 5 Car. II. 1653, a judge expresses himself thus: — “ If an order in parliament shall be in  
“ force after the dissolution of a parliament, and there be an  
“ order for the commitment of one or more, I pray which  
“ way can the subject be relieved but this way—in case we  
“ should live to see a parliament but once in an age, as in  
“ the latter end of king *James*, or as in the reign of the  
“ late king?”

*State Trials*, vol. II.

Let



Let us imagine the culprit a popular favorite; the king his oppressor, by a corrupt house of commons; and the imprisonment, by a *judicious* number of these *dissolutions*, an imprisonment of ten years, or indefinite (as of course it is), at the mercy of his royal persecutor;—I would ask, if demonstration would not be required, before such a tyranny could be admitted, as the effect of his legal power in dissolving the parliament?

Whatever tends to aggravate the mischief, not only of *delay*, but of any other, and *peculiar* severities imposed upon the culprit under an impeachment, for the sake of public justice, ought certainly to be avoided, unless they are essential to the nature and soul of that proceeding.—I hope this principle is correct; I am sure it is just, and humane—" *bonum facile crederes.*"—Let it be applied: It is a very peculiar circumstance of advantage given to *this* accuser, that, as the public trial is watched by him, he may not only, at a convenient minute, recal a charge which he is not able to substantiate, but may accuse again, and again, upon points absolutely new: Upon every *adjournment, and prorogation*, as a witness drops, or comes forward, this right may be exercised; but if the king *dissolves* a parliament, and for-

bears to call one (*say for two years and a half\**), the impeachment still *depending*, and liable to be *resumed* †,—how does this advantage accumulate against the devoted head! No public interest (which, in some few cases, it *may* accomplish) can atone for such a deep wound in those general principles of mercy and benevolence, which elevate our criminal justice above that of all nations upon earth. If it be said—that between one parliament and another, the interval is now become extremely short, not only in point of habit, but from various political necessities; which make it, in effect, almost impossible for the king to dispense with a parliament beyond the usual period between the new writs and the return: Yet can I fairly be told, that even such an interval *may* not, by influence upon the new and general election,—upon the new and elected sixteen peers of Scotland,—or upon a new batch of English peers created within the interval,—turn the fate of the culprit?

There is another powerful objection in point of *justice* (which I hope is *convenience* too, and the

\* *Charles the second* laid aside parliament for upwards of *three* years before his death.

† To imprison “till delivered by the house of lords,” if it extends to the *next* house of lords, is to imprison “during the king’s pleasure;” which is directly against the “*petition of right* :” as the *Earl of Danby* well argued.

*only*

only convenience that will be named in criminal proceedings) to the continuance of impeachment after a new parliament. The discretion of the commons whether to continue, or abandon the impeachment, if they at all exercise it by a due examination of the evidence which has been heard, is to depend upon *written evidence* at best; whereas, the original accusers *heard* the evidence, and marked its impression upon their own, as well as the public mind. The judges, who are new (the peers of Scotland, for example, recently elected), will determine upon written evidence alone, the guilt, or innocence, (and as it may be in some cases,) the life, or death, of the culprit.

It may be said, that *adjournments* and *prorogations*, indispensable to the power of the lords, and the power of the king, may also be of the same prejudice. But they are essential parts of the constitution, and essential defects of impeachment, co-æval, as far as we can trace them, to the origin of that proceeding.—Shall we, therefore, superadd, upon refined, and strained analogy, the accumulated prejudice of all those cruel differences against the personal freedom of the subject, which a new parliament may produce?

We are told, with an ingenious fallacy, that *vivâ voce* evidence is not universal, or essential,

‡ E in

in other courts; that judges aggravate, or mitigate punishment, upon *written* evidence, delivered in the form of an affidavit;—that every judge who makes a *note* of that which he *bears*, depends ultimately upon the *note*.

Here two things are blended into one. Where the court has a discretion in the measure of punishment, the legal evidence of mitigating, or of aggravating circumstances, presents itself in the form of an affidavit.—But the second proposition, which has not the least analogy to the first, is a perfect mistake.

For, upon every indictment, before the fact of guilt can be established, though he takes a *note* of the evidence, he has a *memory* of his own to accompany that *note*; and he never depends, in stating facts, from which a verdict of guilt, or of innocence, may be inferred, upon the *memory* of *others*, who heard what he, neither actually heard, nor could have heard, himself.

But if it were otherwise, it would not apply to this case, in which the peers are also juries upon the important question of the *fact*;—assisted by *notes* of their clerks, or agents, but necessarily enlightened, if their department is well executed, by that, which no written evidence *can* record;—by their personal comment upon the demeanour of the witnesses,—by the impression

first made upon understandings present at the scene, when the facts are brought out, and compared.

If the *note* of those who heard, were sufficient, as a guide of others, who neither heard, nor *saw* the witnesses, why not receive universally upon impeachments, written evidence, taken by delegates, or committees, in Westminster Hall, and brought into the house of lords upon the faith of *their* accuracy? Why attend these trials? To those who don't *hear* the evidence, it is, merely *written* evidence, or it is the loose *memory* of others;—which is even worse.

Extreme cases are liberal and fair illustrations of a doubtful rule; which is pressed, upon the topic of convenience: And the question is not less fair, than it was ingenious, which one of the dissentient lawyers addressed, if you remember, to the chairman of the committee;—"How  
 " could he, if speaker, instead of chairman,  
 " and if not in the last parliament, give a casting vote upon the delicate question of proceeding in the impeachment, or dropping  
 " it?"—The *discretion* of this public accuser, is a very important branch of his *right*, and participates, in that extent, the *judicial* character: but where can the materials of such a discretion be found, by those who are strangers to the evi-

‡ E 2

dence,

dence, and the arguments, in a cause which they never heard, and in a court which they never attended?

But, without any such illustrations as these, the leading features, and principles of our constitution, prompt us to give our ancestors credit for *policy* in that system of check which they have imposed upon *all* the rights of government, and which rights are seldom absolute, or indefeasible, in *power*, though in theory they admit of no limitation; because they are met, and counteracted, by the effect of rights, and competitors, equally independent.—Let me ask of *you*, who know the constitution so well, if there is any one feature of it more prominent, than a mutual jealousy of all the estates that form the government, and a mutual check, universally operating between them, in the original frame of their inherent powers?

I have the honour to be,

S I R,

With perfect esteem,

Yours, &c.

## LETTER THE SECOND.

“ A representative should never sacrifice his *unbiaſſed* opinion ; his *mature* judgment ; his *enlightened* conſcience, to his *electors* ; to *any man* ; or to *any ſet of men living*.”

*Mr. BURKE's ſpeech to the Electors  
of Briſtol, 3d Nov. 1774.*

S I R,

**I**F the *general principles* which I have taken the liberty of examining, are miſconceived, and ſome of them (particularly the laſt, which confounds political expediency with conſtitutional right) questionable, at leaſt, in their application, upon what *other* grounds can it be affirmed, that the impeachment againſt *Mr. Haſtings* proceeds where it left off?

We ſhall, at leaſt, find theſe *other* grounds, in fact, as *technical*, as thoſe which are ſet up againſt them are deſcribed by the *laymen* to be : But I ſhall hope to convince the reader, that not only they are *technical*, but *false* analogies ; and that ſolid principles, rooted in the genius of the conſtitution, deprecate the continuance of this, or of any impeachment, *after the evidence has in part been heard*.

It was inſiſted — “ That parliament is never  
“ extinguished, and that it never *dies* ; — that it  
“ *ſleeps*,



“ *sleeps*, after a *dissolution*, till the king’s prero-  
 “ gative shall awaken it;—that peers have still  
 “ the *inherent right* of demanding to sit in judg-  
 “ ment \*, as well as to exercise their legislative  
 “ character, when the next parliament shall  
 “ come into action;—that it is the *people* who  
 “ impeach by their *legal organ*, the represent-  
 “ ative; and that it is the *people* who resume  
 “ by a new representative, their function as  
 “ public accusers.” It was compared to the  
*attorney general*, and the *king’s indictment*, pre-  
 ferred by *him*. The idea of considering the  
 popular elector as lost, upon constitutional  
 principles, in his elected representative, was  
 treated with successful ridicule by one of the  
 most eloquent speeches that perhaps was ever  
 delivered in parliament. As I had the misfor-  
 tune to be the object of that ridicule, I have  
 re-examined what I said, not only without pre-  
 judice in favour of it, but with an apprehension  
 that I had been in the wrong when I said—  
 “ that I would refuse the character of *agent*, or  
 “ *attorney*, for the people of England;—that I  
 “ knew of no commons but those who sat as a

\* In the second volume of *State trials*, p. 210, upon a  
*habeas corpus* in *Streater’s case*, Lord Chief Justice Rolle said  
 expressly,—“ That a Parliament was a *new court*, appearing,  
 “ and summoned by *new writs* ;”—which is also a direct an-  
 swer to an assertion made in the debate—“ That a court of  
 “ parliament would be *self-resumed*, when the parliament should  
 “ meet again.”—And where (*unless in Ireland*) is the *inherent*  
*right* of peers at the time of the *dissolution*, who are created  
*after it* ?

“ house of commons\* ;—that I considered  
 “ them as having a very awful trust reposed in  
 “ them ; as representing the popular scale of the  
 “ government, but as being independent of any  
 “ popular controul over them, and as being  
 “ equally independent of their predecessors in a  
 “ former parliament.” In other words, “ that I  
 “ considered them as the commons, or people  
 “ of England, appearing, deliberating, and  
 “ acting, for the popular interest, in the most  
 “ practicable form which the wisdom of our  
 “ ancestors, and the genius of the constitution,  
 “ had been able to model.”—On the other  
 hand, in this view of them, no tyranny is to  
 be feared ;—the right of petitioning ;—the po-  
 pular sentiment abroad, upon measures of alarm ;  
 —the fear of its effect upon a general election,  
 (that political and very awful test,)—are wise,  
 and provident checks upon this power of the  
 commons ; but their constitutional independence  
 of the *elector* (in a local, or general sense of the

\* *Mr. Burke* has touched this delicate subject with a mas-  
 terly hand, in his “ *Thoughts on the causes, &c.*”—“ A po-  
 “ pular origin cannot be the characteristical distinction of a  
 “ popular representative.—This belongs equally to *all* parts  
 “ of the government. *The king is the representative of the peo-*  
 “ *ple.*—So are the *lords* ; and so are the *judges.*—They are  
 “ all trustees for the people.—The forms of our government,  
 “ and the persons who compose it, originate from the people.  
 “ The *virtue, essence, and spirit*, of a house of commons, consist  
 “ in its being *the express image* of the feelings of the nation.”

term)

term) is perfect. *Mr. Burke*, indeed, in the pamphlet just quoted, recommends, “ a *detailed*,  
 “ and *strict* attention to the representative, in  
 “ counties, and corporations, who are to form a  
 “ *political standard* of judgment, by *system*, upon  
 “ his conduct, which conduct is to be known,  
 “ in part, by an accurate list of the votes \*.”

This, if it had not been written by an approved, and zealous advocate for political decorum, would have struck me as a wild, and, at least, as a very unconstitutional, restraint upon the *independence* of the commons in parliament.

As to the opinion delivered by me in the *debate*, I religiously persevere in it, and cannot repent of it, or think it worthy of ridicule, if a little more attention is given to it, than is due, personally, to *me*.

But it has been said, “ the commons impeach  
 “ *in the name of themselves*, and of *all the commons of the realm*.” This proper, and empha-

\* One peculiar benefit, and according to *Montesquieu*, one efficient cause, of the *representative* character, is, that it guards the constitution against this very idea of a *political standard* upon the measures of government, attempted by the people at large; who cannot form it with accuracy, and judgment, or make the attempt without anarchy, and mischief.—The *habit* of political *discussion* is not for *them*, and they have put it into better hands; though it is, upon great emergencies, their *exclusive* privilege, to *decide*;—by their *feelings*, more than by their *opinions*.

tical

tical description of the representative character which they hold, adds not a single feather to the power of the constituent, who is bound in every one act, by the independent energies of that mind which he has entrusted. The *commons in parliament* are, as *Mr. Burke* expresses it, in the note just quoted, by “*express image*,” the *commons of the realm*.

I agree, that we are the *legal organs* of their will; but of their will, as communicated, and implied, in our own. When I said, “that we had “no such character as that of their *attornies*, or “*agents*,” I meant, and explained myself to mean, that after we took our seat, we could not be at all bound by their commands, or influenced by their wishes, against our own judgment\*;—that we could not be disowned, or abandoned by them;—and (which is the most important circumstance) that we could not be touched by what our predecessors, in the representative character which *they* had exercised, had said, or done, if it had not been sealed by the legislature. The case put, of the *attorney general*, is decisive to mark, not the analogy, but the distinction:—“If *he* dies, the suit proceeds, “or may proceed where it left off:”—True;—

\* An opinion countenanced by *Mr. Burke*, and supported with his accustomed abilities, in a personal situation of his own, recorded by himself in the passage which I have borrowed, and placed at the head of this letter.

but is the *attorney general* independent, either of the king's pleasure, or of his predecessor in office? The king may displace him at a moment; and he is bound by the acts of the former attorney general.—Why? because the king is bound by them, as acts of his own, through *his own servant*, which *he* never can recall. But I conceive it an essential part of *our* character, that we have no such fetters upon *us*; that we are constitutionally *perfect strangers* \* to the commons who sat in a parliament that is no more; and that we are not even *suffered* by the constitution to give them credit for any one of their proceedings, let it have been ever so wise, deliberate, salutary, or acceptable to ourselves.

It was in this view, that I marked the various instances, in which, though it might be extremely inconvenient, the new house of commons were *disabled* by the ancient, and modern principles of parliamentary law, to carry on the chain of proceeding from the link at which it was left, when the former parliament closed:—Nor was it only, as a part of the legislature, in framing bills, or in the appointment of *committees* † for any other purposes;

\* In *Streater's case*, the words of *Chief Justice Rolle* are these: “An order in parliament is not binding in succession. —How shall the next parliament *know* of a former parliament's order?”

† In the case last quoted, the *Chief Justice* argues from the analogy of *committees* against the continuance of an order to imprison

purposes ; but as a house of commons tenacious of all its separate privileges, that it suffered, by force, that inconvenience.—What becomes of the *legal organ*, when the commitment for a single day will atone for the most atrocious act of disobedience, or of insult, if the day is closed by a dissolution of parliament?—What becomes of it, when a day having been appointed for the attendance of a culprit, if the day never comes in that parliament, he, the culprit, is free as air\*? —What becomes of the *legal organ* when a bill of attainder has passed the house of commons, after as tedious an enquiry as even preceded this impeachment? Could it be sent up, in that state, by the next house of commons? Yet, in bills of attainder, the very nature of the expedient points at a culprit of more iniquity, and assumes a demand of more pressure upon the justice of the kingdom, than where impeachment is preferred. Put the case, that such a bill had been sent up to the lords, and had passed *their* assembly too; but that before the king had given assent, the parliament had been closed—Could

imprison by parliament, as a court ; and pronounces *judicially* that both are at an end when the parliament has been dissolved. “ *We do not reverse*” (are his words) “ the order of parliament, it is reversed by the parliament’s dissolution.”

\* 17 Cha. II. 1665. *The king against Prichard.* 1 *Levinz*, 165. It was held by the court of king’s-bench, that even *prorogation* had this effect upon a commitment by the lords for a contempt ; and it was distinguished in that respect from writs of error.



the bill be offered by the two houses united, in the next parliament, for the royal assent?

I am perfectly aware, that in every case of bills, there is a *rule* which treats them as being imperfect acts of the entire legislature, and *therefore* disables the continuance of them, unless by the same parliament; but *why* should the disability of their continuance result from their legal imperfection, if the new house of commons may acquire possession of the evidence, or may agree to the wisdom of the original proceeding?—Why should not they tell the lords—“ We think it safe, to offer the bill as it stood in the last parliament; many of us formed that bill; the rest of us are masters of it by consultation, and report.”—“ No,” the constitution answers them,—“ you shall see, in all your functions, with eyes of your own, before you act in proceedings that are intended ultimately for a law.” In *attainder*, the mischief resulting from a *dissolution*, is precisely the same in its nature, but heavier in its degree. There too, the commons are more than accusers upon *probable evidence* (which is ground enough to justify an *impeachment*); they are *judges*, though in a legislative dress, and pronounce the culprit guilty of a capital offence, as a delinquent of state, when they pass the bill. If it shall have passed the lords, that same assembly, who upon the impeachment are judges, and without appeal—are judges



judges again, though in a different shape, and judicial assessors to the commons : If they agree, it is the united, and *judicial* authority of both assemblies. In a bill of attainder it has been found expedient, (and, though it is a delicate power, I hope it will never be abandoned,) that a legislative controul, of more latitude, should reach an offender whom the rules of judicial policy would exempt from punishment.

Here, then, is a case that cries aloud against the power of a *dissolution* to supersede the whole *trial*, and challenges to the public security, that no such expedient should intercept the justice of the kingdom ; but who shall tell me, that *Lord Strafford's* bill of attainder could have proceeded, if the king had closed the parliament before that bill had obtained the royal assent ?

I have now discussed every topic of reasoning which I can recollect, upon the various points of the debate, independent of that *usage* which is, in other words, the *course* of parliament.

Here it was pronounced a fatal defect in those who represented *usage* to make an impeachment, and the parliament that gave it birth, die together, that no *clear tenor of usage* could be found in support of their hypothesis.

But

But surely, the *onus probandi* has been shifted in this objection, and *clear usage* has been required from *our* side of the debate ; though it is necessary to require it from *yours*, which is to support, at least, a departure from the original principles of a new representative, unfettered in *every other* imperfect proceeding, by the act of his predecessors who had begun it, when *they* had a character equally independent ; and the argument for continuing *this* impeachment, begins with no advantage-ground, if it can be said with truth, in opposition to its advocates, —“ *You have no clear usage for continuing an*  
“ *impeachment, after evidence, and in statu*  
“ *quo* ; that is, where the evidence broke off in  
“ *a former parliament.*”

It is an admitted fact, that impeachments are as old as the 10th of *Richard the second* at least. But from that period, not ONE of them till 1678, has been continued in the next parliament ; and even to this hour, no ONE impeachment has ever been taken up in the next parliament, where *a single witness* had been examined in the former. Is *negative usage* of this kind, insignificant, where the *general principle* of discontinuing what the former house left imperfect, is collected from so many *positive* instances ;—in opposition to the same topic of *salus populi*, or *state-necessity*?

Upon

Upon the argument of that captivating plea which has been used against the king's protection of his favorite minister, I have taken pains to dispossess myself of all prejudice; and, like the constitution, to look on both sides, particularly in that view of the subject which points at the *dissolution*, as enabling in effect the very same *pardon* to exist, though in a different shape, which the law has disabled when it can show its face upon the record. But I am not sure, that it would, upon the whole, be wise for the public security, and for our liberties, if an act were to pass that should in future disable *this* effect of a *dissolution*, unless with many guards against the abuse of that new arrangement: Of this I am perfectly sure; that it may be converted into an engine of oppression, by delays, and changes in the judge, or the accuser, that would be deeply injurious to the culprit.

Besides, the whole argument assumes, that of course the king will make a bad use of his *prerogative*; and that no house of commons will ever make a bad use of their "*privilege*;" to use the fashionable word. I am as firm an advocate for the popular scale of the government as any *whig* in his majesty's dominions; but I desire to be no better *whig* than *Serjeant Maynard*, and *Lord Somers*, who tempered the *Revolution* by those reciprocal guards between the monarch, the

aristocracy,

aristocracy, and the commons; upon which alone, that liberty, which is the animating principle of our constitution\*, will for ever depend.

The independent character of each estate, in all its branches of power, is the vital principle of our constitution. The commons have the admitted power to *accuse*, and recall the accusation at pleasure;—the lords are to *judge*, and, like other courts of legal jurisdiction, by rules of their own;—the king has the exclusive right of *pardoning* the sentence.

It is agreed, that as the same commons may at any time close their impeachment by *their* discretion, it must of course drop in the next parliament, unless revived by the discretion of their successors;----and that a new election *may* return to parliament those who did not, and could not, hear the evidence upon the impeachment; those who cannot, therefore, make up their minds to a judgment, well informed, whether to retire, or proceed.

\* But after all, “*we have no constitution;*” that is, we have not a “*body of elements*, formed by the *people* before “the government was constituted, and enacting article by “article what the government should be;—we have therefore a constitution to make;”—that is, the *people* are to make it, according to the *rights of man*, which are to have the *lion’s part* in this new *body of elements*, that are to constitute a new government.—Another *jeu d’esprit* of Mr. Paine, inviting us to destroy the *government*, in order to have a *constitution*!

It is, it must be, admitted, that in every function of power, exercised by *other* courts of justice, a political demise of the entire court supercedes the imperfect proceeding, and requires a new one, even if the record is preserved. This originates in the idea, that it is not safe to give a right of judgment, when the parties have not been completely heard by the same court.

If a cause in equity is upon the point of a decree, and the chancellor who resigns gives up his *note* into the successor's hand, it must be completely re-argued. In criminal proceedings, I shall not repeat the effect of a disability upon judges, or juries pending the suit.

But the analogy of the king's demise, and its fatal effect upon all proceedings at *law*, before the act of parliament, has never yet been answered. Upon what principle was a culprit, who had been tried upon *indictment* for high treason, protected by *that* species of *dissolution*, from the effect of all *evidence*, heard, and received against him at the former trial, though he was called upon to *answer* again? Upon what principle, but that of considering the court as new to the first proceeding?—But would a peer, in those days, have been tried by a different principle *for the same offence*, before the house of lords, upon the removal of an indictment followed by the regal demise?—If he would not, I ask, why in the case of an impeachment *for the same*

*offence*, and that impeachment followed by a *dissolution* of the parliament who try him, unless upon topics of *political* convenience, which cut both ways, and are at least no grounds of a *judicial* resolution?

Of *usage*, precedents are material, and solid proofs; though I by no means agree to what I heard in the debate, that of course the *last* resolution was the law. It is not so in courts of legal justice—for though credit is given to it, yet the judges are not bound by it, if it is not law. But, on the other hand, I can as little agree to a most extraordinary position which the same debate, rather fertile in paradox, announced, and with popular effect; namely, that we are in a case of “*privilege*,” and must look at no journals but our own.—What is meant by the word “*privilege*,” which is never to look before it leaps, and is to affirm *judicially*, where it has *no* judicial powers, what a court who *has* them *is to do, or say*, without considering what it *has done, or said*; is above my *unprivileged* apprehension. Indeed, I never heard that a right of impeachment, though it certainly is an *exclusive jurisdiction*, was “*privilege*” —a term which

\* The term strictly, and originally means “a *personal advantage*, by a law, which distinguishes *one man* from *other men*.”—The Roman laws of “*privilege*,” are “*leges de privis hominibus latae*.” CIC. *de Leg*.—It extended itself, in a course of time, into *office, rank*, or any other peculiar descriptions of men, but retained its character of being merely a *benefit, or gratification*; which the *right of accusing*, by impeachment, has never been called, as I recollect, before this debate.

I have



I have understood as applicable rather to the immunities, and protections of the Commons against the course of Law, or to their claims of honor, than to a right of accusing culprits before the public justice of the kingdom\*. But this, at least, is clear;—that if *Privilege* addresses itself to a Court of justice, and becomes an accuser, it must be governed by the rules of that Court, not only in the course of trial, or in the Judgment of Law, but in adjusting the extent, or boundaries of the jurisdiction.—In telling the Lords, what their Judgment should be upon the *Earl of Danby's* plea, the Commons usurped upon the rights of that Court, without a shadow of authority. When they interfered with a day appointed for the discussion of his plea, and menaced his counsel, or friends, if they should appear for him in Court upon the argument of his claim, they added insult, and oppression, to an illegal encroachment. But what is the question here?—It is the *usage* of Parliament in proceedings upon Impeachment. If this House had once voted a judicial

\* In the eloquent and spirited Apology to *King James* the First, which Mr. *Petyt* has recorded, (Journ. Parl. 227.) the rights of the Commons, in point of *privilege*, are—freedom of election—freedom from arrest—and freedom of speech; to which may be added, freedom of access to the King.



proposition respecting the duty of the Lords, and their uniform conduct, *acquiesced in by the Commons*, had been the other way; shall we open our eyes to the former, and shut them against the latter\*?

Even in 1678, the Commons (after they had stated the pardon as illegal, in an address to the King upon the first rumour of it) examined precedents upon the effect of this plea; and reported, that no instance could be found of a pardon so pleaded. Where could that negative testimony be found, but in the *Journals of the Lords*?

This novel idea, of refusing to look at the Journals of the other House, was not explicitly adopted by the Committee, and *the first author* in the House reasoned upon a variety of precedents taken from that Court; I shall therefore assume the right of examining them here.

I am, SIR, &c.

\* There is a very curious proceeding against *Lord Orrery*, upon the 25th Nov. 1669, by which it appears, that the Commons took up, as Judges, an Impeachment *in the name of* two private accusers, for high treason, without consulting the Lords.

## LETTER THE THIRD.

Qui didicit *patriæ* quid debeat, et quid *amicis*,  
 Quid sit *Conscripti*, quid *Judicis* officium, ille  
 Reddere personæ scit convenientia cuique.

HORACE.

SIR,

WHAT then does your argument upon these precedents, first encounter? A very inauspicious fact, it must be admitted; for, by the *latest Judgment* of the Lords upon the very point itself, an *Impeachment is terminated by a dissolution*; and the culprits are set at liberty.

The resolution by the House of Peers 1685, is in these words:

“ Upon consideration of the cases of the  
 “ *Earl of Powys, Lord Arundel of Wardour,*  
 “ the *Lord Bellasyse*, and the *Earl of Danby*,  
 “ contained in their Petitions, after some debate  
 “ this Question was proposed—Whether the  
 “ Order of the 19th of *March* 1678-9 shall be  
 “ reversed

“ reversed and annulled as to Impeachments ;  
 “ the Question being put—Whether this Ques-  
 “ tion shall be now put ? It passed in the af-  
 “ firmative ; then the Question was put — Whe-  
 “ ther the Order of the 19th of *March* 1678-9  
 “ shall be reversed and annulled as to Im-  
 “ peachments. It was resolved in the affirm-  
 “ ative.”—The Order so reversed and annul-  
 led is in these words:—“ The House taking  
 “ into consideration the Report made from  
 “ the Lords Committees for Privileges—That  
 “ in pursuance of the Order of the 17th instant,  
 “ to them directed, for considering whether  
 “ Petitions of Appeal, which were presented  
 “ to this House in the last Parliament, be still  
 “ in force to be proceeded on, *and for consi-*  
 “ *dering the state of the Impeachments brought*  
 “ *up from the House of Commons the last Par-*  
 “ *liament, and all the incidents relating thereto ;*  
 “ upon which the Lords Committees were of  
 “ opinion, that in \* all cases of Appeals and  
 “ Writs

\* Is it not remarkable, that, asserting *all* Writs of Error,  
*&c.* to continue in the same state, they only assert *the Im-*  
*peachments brought up in the last Parliament*, so to continue ?  
 The question upon both, was as to Writs of Error and Im-  
 peachments *which were in the last Parliament*. But the answer  
 is *general* as to all *Writs*, and *particular* as to *Impeachments* ; for  
 this obvious reason : Impeachments which had not been pro-  
 ceeded

“ writs of error they ‘continue, and are to be  
 “ proceeded on *in statu quo* as they stood at the  
 “ dissolution of the last parliament, without be-  
 “ ginning *de novo*;—and that the dissolution of the  
 “ last parliament, doth not alter the state of the  
 “ impeachments brought up by the commons in that  
 “ parliament. After some time spent in con-  
 “ sideration thereof,—it is resolved, that this  
 “ house agrees with the lords committees in  
 “ that report.”

Upon the view of these two resolutions, it is impossible, I think, to be denied, that as what they affirm respecting impeachments cannot be reconciled, it is the *later* opinion and judgment of this high court—“ that a dissolution of parliament *does* alter the state of impeachments brought up in that parliament.”

It has been said—That a resolution to annul, and reverse a former, does not of necessity affirm any *other* proposition to be law, but leaves the law to its fate, independent of that resolution; that, for example, the doctrine con-

ceeded upon, or upon which no witnesses had been examined—fell within the reason which applied itself to *all* writs of error. They were all upon record, and there was nothing more of them.

tained in the *first* resolution, concerning the *Middlesex election*, is open, though whatever authority may have been given to the doctrine by that resolution alone, is done away, by the *second*.

This way of reasoning may, in some cases have its weight, but it has none upon questions like these, of a judicial nature; for in these, if the court gives a judgment, and acts upon it at one period, but reverses it afterwards, and acts upon the reversal, it affirms, in effect, the judgment which it reverses, to be erroneous. Here too some of the very peers, at whom the former judgment was levelled, are saved from it by the court, in this later judgment, as in the nature of an appellant jurisdiction.

It is true, the petition of those *peers* had stated no ground for discharge, as resulting from the effect of the *dissolution*, but had suggested *other* circumstances. The catholic peers, their innocence, and the convicted perjury of *Oates* — The *Earl of Danby*, relying upon the length of his imprisonment, (before he was bailed the *12th of Feb. 1683-4*.) and upon the want of oath or affidavit against him at the time of his first commitment.

But the Lords, finding this *Order* of 1678 in the way, took up the consideration of it; and by *reversing* it, they, in substance, declared the Law to be—that by a dissolution of Parliament, the right of the Commons upon Impeachments, which that Parliament had begun, was at an end in the next.

This reversal having taken away the controul of the Impeachment over the Catholic Peers, they were left upon the Indictment which had been removed, by *Certiorari*, into the House of Peers, as pending the Impeachment, it could not proceed at law, and the Lords had a controul over it; but a *nolle prosequi* having been obtained, the bail taken upon those Indictments was discharged upon the 25th *May* 1685: Upon the *first of June* following, the bail for appearance of all the Peers who had been impeached, (the *Earl of Danby* included,) and the Peers themselves, were discharged; so that here, at one blow, was ended every idea of controul in the House of Commons over an Impeachment, after a *dissolution*;—it was ended by a *Judgment* of the Lords;—and by an *act* in consequence of that Judgment, a release of the culprits. *Burnet* says,—“ The House of  
“ Commons dropt the Impeachment, and *there-*  
“ *fore* the Lords were discharged.” If that

H

were

were true, it would give additional force to the Order of reversal, as not being necessary for these Lords, but as being necessary, in itself, to form a general rule; (at least a similar argument was used in support of the Order 1678; namely, that it could make no difference to *Lord Stafford* or the *Earl of Danby*, as new Impeachments would certainly have been framed against them;) but I can see no trace of the fact which *Burnet* intimates, upon the Journals of Parliament.

In that view, and if no other precedents appeared, it would seem to be, at the best, very improvident, that *we* should affirm a judicial duty of the Lords, irreconcilable not only to this latest *Judgment* of *their* Court, but also to the *act* which had followed upon it;—though we should give the name of “*privilege*” to our interference.

It has been pressed against the Order of 1685, that it has retained the legal, and reversed the constitutional, part of the Order 1678, by reversing what relates to Impeachments, alone.

But if the effect of other judicial proceedings can be distinguished from the effect of an Impeachment, in clear authority, and sound reasoning, the distinction gives credit even to the discriminating



nating part of the Order 1685. That such a distinction between them does prevail, will be marked in the sequel.

Be this however as it may, there are two grounds, upon which the later judgment would become the law of the Peers, in their judicial character, and of the kingdom.

The *first* is, that for the Order of 1678, as built upon the supposed analogy to that of 1673, there was no colour of law.

The *second*, that after 1685, and *after the Revolution*, credit was given by the House of Peers, upon dispassionate examination, and a *judicial* review, to the Judgment of 1685,—the Commons acquiescing, and therefore tacitly approving that credit.—This too will appear in the sequel.

But first it may be thought material, to consider the historical, or political features of the *age*, in which the Order of 1685 issued, and which have been extremely misunderstood. I am,

S I R,

With respect, &c.

## LETTER THE FOURTH.

— Haud illa viros vigilantia fûgit.

JUVENAL.

S I R,

**I**T has been truly said—that all these Peers, except the *Earl of Danby*, were Catholic, and of the King's religion, who had a powerful influence over both Houses.

The two dissenting Lords, however, in their Protest, threw another imputation upon the Order of 1685, which is, that extra-judicially, and without a particular cause, it endeavours to alter a judicial rule, made and renewed *after long debate, Report of Committees, Precedents, and former Resolutions—without permitting the same to be read.*

The first of these imputations (which unquestionably is false in the fact) accuses the Lords of *partiality* for the Catholic Peers; and the second, as far as credit may be given to it, ac-

cuses them of *precipitation*;—in which offence the two Orders may shake hands together.

But (it must be remembered) the King, tyrant, and bigot as he was, had not offended the Commons at this period, by measures of particular *alarm* to the established religion\*; and that the Commons were extremely vigilant in their general suspicions.—The *Duke of Monmouth*, indeed, called it a “*pack’d Parliament*;” and Mr. *Hume* says, “it was formed of Tories, “or High-churchmen:” It certainly had been thrown very much into the hands of the Court, by the surrender of the Corporations, in the last reign, and by the odium of the *Rye-house* plot, which had made the Whigs extremely unpopular. But there is internal evidence that men of public spirit exerted themselves with laudable jealousy even in this first year of *James the Second’s* reign. I mentioned in the debate, that *Ser-*

\* We know, indeed, from *Sir John Dalrymple’s* Memoirs, that before he called his first Parliament, he negotiated for money with *Lewis XIV.* and marked, in a conversation with *Barillon*, his determined zeal for Popery. But it appears in the same papers, that, in August 1685, the King told him of the alarm he felt upon account of the jealousies against him in Parliament.—I am aware that some doubts have been thrown upon the veracity of this writer; but I wish that every historian stood upon such a rock: He refers to original manuscripts in a *public* repository, to which *others* can obtain access. His work has been long published, and has never been answered.

*jeant*

*jeant Maynard* †, who assisted afterwards in forming the Revolution, who was then adverse to the Court, and who had been one of the Managers in support of *the Order in 1678 against Lord Stafford*, was in that very House of Commons. We have the note of a short speech delivered by him in this year, 1685, against a supply:—I will copy the words, to mark in what spirit that great lawyer, and statesman, then acted. “ There is already a Law, that no man shall  
 “ rise against the King:—Lords and Deputy  
 “ Lieutenants have power to disarm the dis-  
 “ affected. If you give thus a *supply*, it is for  
 “ the army; and then may not this army be made  
 “ of those who will not take the Test?—Which  
 “ act is not designed as a punishment for the  
 “ Papists, but as *protection for ourselves*—and  
 “ giving this money is for an army.—*I am*  
 “ *against it.*” Burnet says, that *Serjeant Maynard*, about the same time, was the chief opponent of an act, which made words High Treason; and spoke with much impresson, as well as gravity, against this favorite measure of the Court: it is inconceivable, that with all those

† This extraordinary and superior man told *King William*, at the Revolution, that he should have survived, if it had not been for *him—the Law itself*; and then, being towards ninety years of age, had the great Seal put into his hand, as the first Commissioner. His capacity and learning were of the first rank, and would have done honour to any age.

jealousies

jealousies of the King's partiality for the Catholic interest,—with his memory, too, of this Order in 1678, and of the advantage it gave to *him* against a Catholic victim, he should have seen the Lords reverse the Order in favor of Catholic Peers, without one complaint, unless he had conceived the Order to be illegal, even against those who were the immediate, and, at least, nominally, the sole objects of it.

But I must beg to insist, that in those times, and in this very Parliament, were some good, and sound Protestants. The resolution they had formed, was to admit of no alteration that would enable a Catholic to enjoy place, or preferment, of any kind, under the Government.

The King had avowed himself a Catholic, had gone openly to mass, and had put Catholics into his army in *Ireland*. We shall see what an opposition it produced.—*Oates*, however, had been convicted of perjury, and his conviction (standing upon evidence unimpeached) had the effect of discrediting the rumour as to the Popish Plot, upon which *Lord Stafford* had lost his life, the victim of that perjured miscreant. This Peer's execution is more a part of the Order in 1678, than has been generally understood, as I shall prove hereafter; but even after that conviction of perjury, so averse were the *Whigs* to the discredit of a popular, and (as they conceived) a salutary

lutary fiction, that some of the Lords *protested* against the reversal of *Stafford's* attainder, and the Commons would not pass the Bill; insisting, that it was *a legal, and just attainder*. This I mention as another trait of their jealousy against the Catholic prejudices of their King\*.

Yet his first address to the Parliament, offered, in very solemn terms, to guarantee their property, and *religion*. The necessity of that fraud indicates that he was in some fear of this very Parliament, for else he would have spoke out.

But a circumstance arose, which is decisive to show a jealousy of the King, and a public spirit in many of the Commons. *A full Committee of religion* sat, and passed a vote, *nemine contradicente*, upon the 27th May 1685, for the defence of *the reformed religion of the Church of England*; and for an address to have the Laws put in execution against ALL Dissenters WHATSOEVER. The argument in the House against this resolution was plausible enough, and prevailed; but the address, voted afterwards, was not servile, for though it expressed a reliance

\* *Dalrymple*, in his Memoirs, gives the master-key to this dilemma in politics. "Reparation could not be made without throwing disgrace upon four succeeding Parliaments — upon the whole party of the Whigs — and upon many of the Tories; nor could popish victories, with safety, be allowed in a popish reign."

upon

upon the King's word, it marked the *established* religion, as *dearer to them than their lives*—words (as *Burnet*, and *Hume* say of them) very unacceptable to the King.

The next event was *Monmouth's* Rebellion, in which the Parliament were not more loyal, than it became good subjects to be.

*Jeffreys* indeed, at this time, became a personal favorite of *James*, and gave disgust by his licentious conduct, as well as cruelty in judicature.

In the month of *Nov.* 1685, the Commons put an affront upon the King, almost unexampled, by adjourning the consideration of his Speech from the 9th to the 13th. In that Speech he had offered an apology for the Catholic officers; and had solicited a perpetual aid.—When the day arrived, the Commons voted a supply for *present occasions*; but would neither specify the *amount*, nor the *use* to which it was destined. Upon this, a long debate had arisen, and the numbers were 250 against 125 in favor of the *Whigs*. The very same day they divided upon the most constitutional of all Questions—whether to postpone the *supply*, or *grievances*,—and it was carried (though by a single vote) that



they should first consider the *popish officers in the army*. It was then voted—"That this reception of popish officers into the army was against Law—to address\* the King for their instant removal, and a Bill for their indemnity, as to the time past." Upon the Question respecting the amount of supply, Nov. 16, 1685, the Court was out-voted, and † 700,000 *l.* substituted for 1200,000 *l.*

Upon the debate respecting the concurrence of the Lords to the address against the popish officers, the Court prevailed—the King was, however, piqued—used peevish language, but still dwelt upon his promises. At a later period the Commons unanimously voted an address to him—the Lords took up the same topic of the popish officers—the King was present, and very much hurt at their freedom.

*Fox*, then paymaster of the army (and the lineal ancestor of your friend, who will make that name immortal), was turned out of his employment, for his vote against the Court; and the *Bishop of London* was removed from the

\* The Address is decent and smooth; but more was meant by the words than what strictly they expressed.

† This was lost by his continued prorogations, before it had been settled.

Council Board :—(We have *heard* of such measures in later times.) In the debate against the repeal of the Test, upon which the Bishop had given offence, *Jeffreys* the Chancellor, who had insisted, that general compliments in the address had precluded opposition to the measures of Government, was overborne by the Peers, and proved himself a coward \*. (Cruelty, and cowardice always go together.) Upon this debate, the *Earl of Devonshire* had said, with a very high-spirited sarcasm—“ That he was for *giving thanks*, because the King had spoke out so plainly, and warned them of what they might look for †.”

A little after this time, *Lord Delamere* was acquitted by the Lords, partial as they were, (for it was even a partial summons,) without one dissenting voice—though *Jeffreys*, a personal enemy of the culprit, was the High Steward—though it was a favorite prosecution of the King—and though *Finch*, the King’s confidential advocate, (confirmed in it by *Jeffreys*) asserted, that one

\* It was a new spectacle, to see Bishops opposing the King’s will, and *Jeffreys* making apologies. *Dalrymple*.

† He had been very keen against the *Earl of Danby*, in the House of Commons, but he never complains of the Order 1685 :—he was present when it passed, without a division; and was not one of the dissenting Peers, who protested.

witness, with presumptions, would convict of High Treason\*.

I have thrown these passages together, in order to mark, that whatever general description may have been given of this period, it was by no means without energy, and public virtue.

It was in a part of this period—it was after the popish officers were put into the army—that the Order of reversal (1685) took place, which took away the “*Palladium*” (as it is now called) of the English Constitution. And I again ask, what lethargy possessed those who were alive to other jealousies, that, aware as they must have been of the effect which the Order of 1678 produced, in cherishing that popular fable of the Popish Plot (which they refuse to discredit by reversing *Stafford*’s attainder)—aware of the immediate benefit resulting from this Order of reversal to the Catholic interest in the person of those Peers—they utter no complaint against the House of Lords for this act, and, by their silence, brand the Order of 1678 themselves?—Nor can I too often impress upon the public

\* We have the King’s remark upon this, in one of his private Letters—“ He had good luck, and just Judges.” But *Lord Delamere* was made his bitterest enemy by this trial. *Clar. Diary.*

attention so curious a fact, as the attendance, and popular exertions of that very *Serjeant Maynard*, and in this very House of Commons, who had said against *Lord Stafford*—" That what has  
 " been once upon Record in Parliament, may  
 " afterwards be proceeded upon; and that if  
 " there was no precedent, he hoped the Lords  
 " would *make* one."

I am,

S I R,

With great respect, &c.

## LETTER THE FIFTH.

Atque fatas, aliò vidi hunc traducere, messes.

VIRGIL.

S I R,

THE Order of 1678 has been stated thus—  
 “ It was founded upon a just, and liberal  
 “ affinity of principle between Writs of Error,  
 “ and Impeachments—between Prorogations,  
 “ and the Dissolution of a Parliament. The  
 “ particular case had not arisen till 1678, but  
 “ the Law of the Peers and Commons then  
 “ united, was declaratory of antient principles  
 “ marked in the resolution of 1673; and stood  
 “ upon the obvious line of difference between  
 “ *every legislative*, and *every judicial* proceeding.  
 “ It *matured the seeds* of a powerful, but con-  
 “ cealed analogy in the Order of 1673\*. It  
 “ gave to *appeals and impeachments* a firm con-  
 “ nection, by calling them *judicial*; and prompt-  
 “ ed this younger plant, the *impeachment*, (with  
 “ all its indissoluble energies,) to form as deep,

\* —“ *Quæ mox cælo properanda sereno*  
 “ *Maturare datur.*”

“ and

“ and as tenacious a root as the other. The  
 “ union of both houses too, gives more weight,  
 “ and sanction to the order, because, at this very  
 “ time, they were differing upon many other  
 “ constitutional topics. The resolution was *en-*  
 “ *forced* against the *Earl of Danby*, who was  
 “ in the tower five years, and solicited, in vain,  
 “ the courts of law ; till *Jeffreys* came, who had  
 “ the courage to bail him. It was *enforced* by  
 “ the solemn trial of a peer, and his execution.  
 “ These were times of popular jealousy, and fer-  
 “ ment ; but from the violence of this party-  
 “ rage, upon very honourable, though mistaken  
 “ jealousies, we can trace the liberty that we now  
 “ enjoy. *Mr. Justice Blackstone* has marked  
 “ the year 1679 for the best in the annals of the  
 “ constitution. An abuse of this power, in the  
 “ case of *Lord Stafford*, is no proof against the  
 “ legal, and constitutional validity of the power  
 “ itself. The *Earl of Danby* had no connection  
 “ with *Stafford*, or the other popish lords. The  
 “ king justified him, adding terms of the most  
 “ offensive insult, and illegally pardoned him.  
 “ The lords attempted a compromise—the  
 “ commons were firm ;—they rejected the par-  
 “ don—they turned with scorn from the com-  
 “ promise—they persevered against the culprit,  
 “ and carried their point, by making the lords  
 “ first give an order for his impeachment, and  
 “ then pass a bill for his attainder, if he should

“ not appear upon a certain day.” To every part of this ingenious, and popular statement I shall give an answer.

The first, and main strength of it, is that *principle*, as it is called, which the resolution, or *judgment* of the lords in 1673 had pointed out; and which, though pointed specifically at writs of error and appeals, (continuing from one session to the next,) extended itself to the doctrine of continuing impeachments, in whatever stage of the *evidence* they were left \*, and continuing after a *dissolution*.

When the unexampled, and irresistible eloquence, to which I have more than once alluded, was displayed upon the general policy of continuing the impeachment, I was lost in admiration of such talents, and public spirit; but when I saw that same eloquence condescending to pick up the order of 1673, as an auxiliary support of the right which he asserted, I thought the materials unworthy of the use to which they were applied; and very inferior to the artificer. The metaphor of the *seed*, which he took from the *highest*

\* The resolution of 1678, asserted nothing of impeachments *in general*: It asserted in substance only this:—“ *the impeachments of the last parliament, upon which no evidence have been taken, stand upon the same footing as all writs of error, which require no evidence to support them, but exclusively depend upon the record.*”

*authority*



authority in the House, and from the most respectable of men, reminded me of that miracle which I have placed at the head of this Letter; and which, to do him justice, the Poet represents to have been a work of enchantment.

In the first place, it was truly, and powerfully observed, that amongst the obsolete precedents, to which that resolution has referred, *not one impeachment* is to be found, though numberless impeachments were then upon the Journals of Parliament; and though some of them, at least, had not proceeded *in fact*, as I had the honour of proving to the Committee by two precedents, to which no answer was given; one of them in 1624, the other in 1660. The effect of them I shall not again describe in this branch of the argument—if at all.

But what is professed by the Peers in the enquiry which they instituted 1673?—A desire to know upon a view of precedents, “ whether after  
 “ an intervening *prorogation*, Writs of error  
 “ and appeals could proceed.” The words are these:—“ 11th *March* 1672-3—Ordered,  
 “ That it be referred, &c. to consider whether  
 “ an *appeal* unto this House, either by *writ of*  
 “ *error*, or by *petition*, from the proceedings of  
 “ any other Court being depending, and not  
 “ determined in one *session* of Parliament, con-  
 K “ *tinue*

“ tinue *in statu quo* unto the next session of Parliament, without renewing the *writ of error*, or petition ;—and report their opinion unto the House.”

The answer given to this clear and simple question, begins (to apologize, I imagine, for the various precedents to which it refers, and which have no application to writs of error, and appeals) by misrepresenting, and widening the question referred ; which the Lords Committees describe as having extended itself, *in words*, to “ *any other business* wherein their Lordships act as a *Court of Judicature* ;” and they subjoin to the words—“ *without renewing the writ of error and petition*,” the words following—“ *or beginning all anew*,” as if they had stood part of the original question.

Then, after stating the various precedents, they report thus : “ Upon the consideration of those precedents,” and of several others mentioned “ at the Committee (but which never appearing, are as if they never existed), they declare it as their opinion, “ that *businesses*” (here they drop the words *as a Court of Judicature*) “ depending in one Parliament, have been continued to the next Session of the SAME PARLIAMENT ;” (words of no trivial emphasis ! ) ; “ and that proceedings thereupon *have remained* in the  
“ same

“ same state in which they were left.”—I have examined, carefully, *all* these precedents, to which the order of 1673 has referred; and when I reflect upon the use that has been made of them, as proving that impeachments after a dissolution of parliament, *even where evidence has in part been heard*, can be taken up, from the point, at which they left off, in the next parliament, I have no power of language to express my astonishment!

There is one general remark, which pervades the whole string of them, and it is, that in all of them the continuance is *by order, specially directing it*; which not only does not prove continuance, to be of course—but proves the direct reverse.

It seems to have been the regular habit, in writs of error, upon the first complaint, that a *scire facias*\* issued, returnable the next parliament†. This is properly no *adjournment*; it is rather

\* What is this but saying—“ We shall take it up, the next parliament?”—for *they* could not issue the *scire facias*. The party must go to the proper court for that writ; and he could not take it out till the day of meeting at the next parliament was fixed, for it must have a return certain.—Is it not then saying, “ bring the defendant in error to us the next parliament, by due process, and we shall begin what he desires of us, *then*?”

† It is almost a distinction without a difference, between the “ *next parliament*,” in very ancient periods, or the “ *next session*,” of a modern parliament, in point of *delay*;—parliaments were then very short, and very often held. But, on the other hand (says Lord Hale), “ the sessions were then so short, and so uncertain, that a new session might end before the day assigned for the return of the writ.”—

rather a *notice* when proceedings will be commenced. But in some few of the cases, it is true, that an *adjournment* is ordered. For example, 1 R. 2. N<sup>o</sup> 28. day was given to both parties till *next parliament*, with *all advantages*, and the *matter to stand as now it doth*. In one of these precedents the *scire facias* being returned by a *tardè vénit*, another *scire facias* issued returnable *the next parliament*; so that a *scire facias*, or the first act of process, always gave this interval, to the *next parliament*.—Many other precedents, quoted by *Lord Hale*, mark the same idea; indeed, he adds, that a *scire facias* in those cases did not, in fact, issue till the next parliament.

Of *precedents*, applicable directly to *writs of error*, there are only *eight* between the first of *Richard II.* and the third of *Henry V.*; of these *eight*, there is only *one*, in which *proceedings have been had* upon the return to a *scire facias*, and a day then given to both parties till the *next parliament*.

It further appears, that upon the 21st of *James*, in a writ of error against a judgment from *Ireland*, a *scire facias* issued, returnable the next *session* of parliament; and upon the same day

These differences afford a very natural reason, why the lords committees in 1673 (though most of their precedents apply, as far as they go, to a *new parliament*) confine the report *emphatically* to a “*new session* of the *same parliament*.”—“In the reign of *Charles I.* (according to *Lord Hale*) the return “*begun to be changed*; and was uniformly “*in præsens parliamentum*.”

in

in which that order issued, *Lord Bridgwater* (it seems) reported from the committee for *petitions* (those of *appeal*, I take it for granted), that they should be retained *in statu quo*, until the next *session* of parliament.

*Eight* other precedents relate entirely to an *original* judicature in the house of peers; and one of them, so late as the year 1671, is a complaint *by a wife against her husband—who is no peer—for ill usage*; when the further debate is adjourned to the first Tuesday of the next *session*. *Five* of these *eight* are as far back as the time of *Edward I.* In one of them, the king of *Scotland* perceiving judgment likely to go against him, desired respite till the next parliament.

*All* the remaining precedents are *two*, and they *alone* are precedents of *criminal accusation*; but neither of them, *impeachments*, or any thing like them. They were both in the time of *Edward the Third*:—One, the case of an archbishop, who was arraigned at his own desire, before the peers; upon which arraignment, certain peers were to hear his answer, and the effect of it was to be debated *in the next parliament*.

In the other, a culprit having been accused in the former parliament (but it is not stated, by whom,) of *extortion*—a commission is given to one peer, and the chief justice, to examine the business, and they report—that by *eight inquests* he had been found guiltless.

All these precedents are introduced by a reference to a writer whose name is *Crompton*, for the form of a *scire facias returnable the next parliament*; so that evidently they are intended as precedents applicable to *writs of error*, and *appeals*, alone.

“ But, in the answer of 1673, it is evident, “ that by the words “ *other businessses*,” the “ lords’ committees mean to determine, the “ continuance of impeachments from session to “ session, and that, in parity of reasoning, they “ must proceed after a *dissolution*, in the next “ *parliament*.”

I beg leave to deny, and shall endeavour to refute, this “ *parity of reasoning*,” but if it should even be just, what could be more surreptitious, and irregular, than the conduct of the lords’ committees in 1678? (and which is, at least, evidence in some degree, of *their* suspicion that they had no ground for the report of their judgment, as built upon that of 1673.) They report *in one day*\*—they never *produce* the order of 1673 (which they call a “ *judgment*”), or *any one precedent* contained in it; and would yet impress upon the lords, by the nature of their general reference to it, that it was an *adjudication* of the *very point* at issue; namely, in other words, that it *adjudged* “ writs of error, and appeals, to continue *in statu quo*, after a *dissolution*.”

\* The reference of 11th *March* 1678, points only at appeals, and is a reference to *opinion*: 17th *March*, a new reference is made as to the mere state of the impeachments brought up in the last parliament, which is a reference to *fact*.

If



If the opinion which they communicate officiously as to the *Law of impeachments*, though it is not referred expressly, even by *them*, to that *Judgment* in 1673, must be taken to have been comprized within the effect of it\*, surely it became them to lay the Judgment itself before the House, in order to have that point a little better understood.

In truth, nothing is more certain, than, *first*, that by the *Judgment* in 1673 a new *Law* was made respecting writs of error, and appeals, after a *general prorogation*. Secondly, that after

\* “ Their Lordships, upon perusal of the Judgment of  
 “ this House of the 29th *March* 1673, are of opinion, That  
 “ in all cases of appeal and writs of error they continue,  
 “ and are to be proceeded on in *statu quo*, as they stood at  
 “ the dissolution of the last Parliament, without beginning  
 “ *de novo*.—The Judgment and proceedings being large,  
 “ are omitted to be repeated, the Journal of this House  
 “ being *ready* wherein that Judgment is entered.

“ And upon consideration had of the matter, concerning  
 “ the state of the impeachments *brought up from the House*  
 “ of Commons the last Parliament, and all the incidents  
 “ relating thereto, their Lordships find, that the five Lords  
 “ who are in the Tower, are upon general impeachment;  
 “ and the other Lord is impeached with special matter  
 “ assigned.

“ And their Lordships are of opinion, That the dissolution  
 “ of the last Parliament, doth not alter the state of the *Impeachments brought up by the Commons in that Parliament.*”

a dis-



a *dissolution*, they were still considered as determined, and abated, without an idea that, by this Judgment of 1673, the Lords had affected that question.

For this I take the word of Lord *Hale*\*, in two Manuscript works evidently written before 1678 and after 1673. They are works of method, and system, intended for posterity, and written by the most enlightened scholar in his profession. A more discriminating head in the arrangement, and application, of science never blest the world.

He *could* have no bias in what he wrote, and it is written without reference to the analogy between Writs of Error, and Impeachments, which analogy had never struck *him* as resulting from the Judgment of 1673.

\* In 1 Ventris, 31 Easter-Term 1669, it was held, That a Writ of Error returnable *the next Parliament*, was not good; and that no *superfedeas* even to a certain day, if remote, could ever tie up the Courts below. It is curious, and very interesting, to see the uniformity of this great man's opinion upon the subject before us. Anonym. 1 Ventris, 267. He says, in his *judicial* character—"It has been taken, that a "*prorogation determined a cause in Parliament*;"—but the Lords have *lately* determined otherwise. The date of this Report is 1674.

His propositions are in substance these:—"that  
 " before 1673, writs of error, unless continued  
 " by *special* prorogation of those writs, *abated* at  
 " common law, in the ensuing *session*;" and he  
 denies the legality of a *superfedeas* upon a writ of  
 error when there is no parliament, or of a *super-*  
*fedeas* directed by the lords, pending a writ of  
 error " *till the next parliament*, because (he  
 " says) there is no certain *time* when parliament  
 " shall be summoned, *possibly not in seven years*;  
 " and the *superfedeas*, if *indefinite*, would be an  
 " intolerable delay to justice:—that he had  
 " known it so determined by the lords in *his*  
 " presence, when *Bridgman* was keeper;" which  
 must have been between 31 Aug. 1667, and  
 the 17th of Nov. 1671:—that *lately* it had  
 been resolved by the lords, *upon the view of pre-*  
*cedents*, (alluding evidently to the order 1673,  
 when he was chief justice,) " to consider the writ  
 " of error, after a *general* prorogation, as in  
 " force." Many of *those* precedents he quotes  
 himself, though for other purposes; and he adds  
 others of a similar import;—" that after a *disso-*  
*lution* of parliament, writs of error, and appeals,  
 " *completely abate*\*; that no *remittitur* of the

\* This was *law before* 1673, as well as *after* it. In *Detbie*  
 and *Bradburn*—Sir T. Raym. p. 5. Hilary term 1660,—it  
 was the very point adjudged.—As a general proposition, it is  
 taken for granted.

“ record is necessary, but the suggestion is  
 “ enough in the court below;—that he has  
 “ known it often so ruled.”

I rely more upon this *direct* assertion of so able, so correct, and so honest a judge, for the *law*, and the *fact* which *he* affirms, than upon all the numerous *reporters* to the same effect;—especially as *they* are in general confused, and as the historical parts of them, upon this topic, are too often either inaccurate or misunderstood.

There is not ONE instance the other way.

What pretence, therefore, could exist in law, to act upon the writ of error and appeal, (at any one moment before\* the order of 1678,) after a *dissolution of parliament*?

But it may be said—“ how can *prorogation*  
 “ be distinguished from *dissolution*, in its effect  
 “ upon *writs of error*, and *appeals*?”

\* The two long arguments which are given to the *Earl of Danby*, are so full of error in *fact*, that it is impossible he could have delivered, or published them, as we find them.

He says, for example, “ that *Lord Hale* resisted the order of 1678, upon the bench;” and even tells us what he said in defiance of it; though *Lord Hale* had been dead more than two years, when the order was made. He died upon the 25th of December 1676.

The

The answer may be described as technical, but it has its root in the constitution. It is, that when the lords and commons are *dissolved*, the court of judicature exercised by the lords, is terminated, and the revival of parliament forms a new court of the lords in parliament; nor can any one reason of *principle* be assigned for disabling the lords to continue *their* proceedings on a bill, which does not apply to them in judicature. It is true, that as to the commons, *they* may be different men by the new return, but the lords are the same, except the sixteen elected peers; and except as to new peers, who may at any time be called up to the house. It is no less true, that in *prorogations*, the suit may be equally retarded; but the delay of *prorogation* is never indefinite upon the face of it, as it *names a day* for the next meeting. Indeed, I take it, the indefinite period of this interval, between one *parliament* and the next, was a forcible ingredient in the policy of that law, which *abated* every thing judicial by a *dissolution*. Lord Hale's reasoning is always forcible upon this topic, and he gives many illustrations of it\*:—When the house of lords issue a writ

\* It is ruled by Lord Hale, in his judgment 1673, *Costen and Sedgewicke*—That if the writ is *tested* at the last prorogation, returnable *at a day certain*, and a term does not intervene, it supercedes execution; but *contra*, if a term intervenes.

of execution upon the original judgment, they do not make it returnable in the next parliament, but returnable in chancery, or in the court from which the appeal or the writ of error issued, *for prevention of delay*. It is now established law (with a view to the same policy of preventing delay), that if, between the *teste* and the return of a writ of error, a term intervenes, execution proceeds.

In short, this guard against the delay, is one great feature, (and surely it is a liberal one,) that protects even a party in a civil action, who, by the judgment of an inferior court, has obtained a right.

But another analogy has been assumed, which is between *errors*, or *appeals*, and *impeachments*; and here more is meant than meets the ear in the words of the judgment 1673: For we are *now* told—" *That judgment* was formed in part, upon  
 " a variety of precedents respecting criminal  
 " accusations in parliament against culprits of  
 " state. The answer, therefore, is a little wider  
 " than the question; and adds, "*other business*  
 " *in judicature*," which takes in impeachment  
 " as another judicial proceeding. The main dif-  
 " ference being this—That in judicature, the  
 " lords are the same court, but in legislature,  
 " the commons may be different; a distinction  
 " taken

“ taken by *Lord Hale* himself. It is true, that  
 “ *special orders* do appear to have continued  
 “ some of those proceedings, but that was only  
 “ for precaution; and if the power to continue  
 “ an impeachment be once admitted, the want  
 “ of *special order* will not weaken the right of  
 “ demanding its continuance.”

Upon my word, Sir, the refinement of these analogies, out-refines all the “ quibbles of the  
 “ law;”—but a few words of plain sense will  
 mark the difference. In *writs of error*, the  
 mere law is upon the record; and there is *no*  
*evidence* begun, which is to be continued. In  
*appeals*, there is, or may be, matter of evidence;  
 but there, from the very nature of the ap-  
 pellant court, *vivâ voce* evidence could never  
 in that shape have been delivered to them.—  
 But upon impeachment, the lords *have* taken  
 evidence *vivâ voce*; and can it be said—that  
 proceedings upon that evidence, well, or ill re-  
 corded, or not recorded at all, but in their me-  
 mories, after an interval of ten years, can be at  
 all resembled to any part of their appellant ju-  
 risdiction, except in the general inconvenience of  
 delay; and which, I apprehend, was a main  
 ingredient of the common law, that abated an  
 appeal even after prorogation.

But another answer is, which has in part been anticipated—*The accuser is no more.*—Every one of those who impeached *may* be out of the next parliament; and in that view the analogy from legislative proceedings appears to me irresistible. A *judgment* upon *evidence* is to be exercised by those who may be absolutely new to it; and cannot, therefore, give their predecessors credit, for *their* floating memories of any one fact, or impression, even if those memories could be reached.



## LETTER THE SIXTH.

Horum *simplicitas miserabilis*; his *furor ipse*  
 Dat veniam;—sed peiores, qui talia verbis  
*Herculis* invadunt, et de virtute loquuntur,  
 Sed quando uberior *vitiorum* copia? quando  
 Major avaritiæ patuit sinus?

JUVENAL.

S I R,

**I**F stress can for a moment be laid upon the  
 “*salutary consequences of the order*, in what  
 “*befel the Earl of Danby himself*,” who, as it  
 has been argued, was the main object of this  
 public spirit, in the commons,—let us examine  
 the *facts* upon record; *first*, as if no attempt had  
 been made by his persecutors to implicate him  
 with any part of the infernal clamour against the  
 popish plot;—and *then*, with a view to their use  
 of that plot, as criminating *him*.

I can venture to assert, upon a deliberate view  
 of the subject, that almost every measure adopt-  
 ed against him by the commons in parliament,  
 before

before and after the resolution of 1678 (levelled also at *him*, as well as the catholic peers), was an outrage even upon the *forms* and the *decencies* of justice; in a house of commons too, as thoroughly *packed* by the *Duke of Monmouth*, as the first parliament of 1685 could have been by king *James*.

For example—they accuse him of *treason*, as resulting from a charge, which, if true, does not constitute that offence. This, indeed, had precedent for, it in the persecution of a better man (*Lord Clarendon*); but that precedent was iniquitous.

In one of the conferences, to justify a *bill of attainder* against him, if he should not appear upon a given day, *Winnington* has these words: “ This is no flight of *innocent Moses* from the “ Egyptians, but of *guilty Cain*.” \* *Sacheverel* says, “ It is but a bill of summons, to keep him “ from *perfecting* his *treasons* abroad.”

\* By the way, this eminent *patriot*, between Dec. 1678 and Dec. 1679, received for his good services to *Louis XIV.* just 300 guineas; and a part of that service expressly (which, it seems, *Montagu* was to manage) was, “ to ruin *Lord Danby*.” In the list which *Barillon* sends to his king, having mentioned *Harbord*, he adds, “ Qui a beaucoup contribué à “ la ruine du Comte de Danbi, 500 guinees.” *Dalrymple’s Appendix*.

They

They prejudge the justice of the Court (before which they accuse him), upon the legality of his defence; affirming to that Court (by way of "*privilege*," I suppose, yet in round, and *judicial* terms) that his plea "*cannot be received*."

But nothing, in the whole tenor of their persecution, is more an insult upon the feelings of men, than what happened as to his plea of the pardon, compared (*ad homines*) to *their own* conduct in vindicating the impeachment;—  
 "We can take every article of it for granted  
 " (say the Lords), but it amounts to no *treason*."

"Hear us, however, to that point (say the Commons) before you determine it."

Yet when the pardon is pleaded (as to which they had been themselves cautious enough to examine precedents, and could only discover, that *in fact* the King had never made this *use* of his *right*), they are in a rage against the Lords, for appointing an early day upon which that plea should be heard; they *demand* an *immediate Judgment* upon it, which is dictated by *them*; and threaten with all their fulminated vengeance, the *advocate* or *friend* of the Earl, that shall dare to support his plea at the bar of the Court, who are his only Judges, and who have ordered that he *shall* be heard.

\* M

. When

When the Earl complains of this to the Lords, they ask the Commons if such a vote had passed;—and receive *no answer!*

The disunion of the two Houses upon other topics, and their union upon this legal continuance of the impeachment after a dissolution, have been stated with an air of triumph in the debate; as if, in the first place, it were a *fact* clear of any doubt; and as if, in the next, it proved the force of truth, which could so unite these competitors, when such an essential point of the Constitution was at stake. But there is no such *fact*, and there could be no such *inference* from it.

The Lords begun with spirit, but they were intimidated in the end by the popular flame, and their concessions, *before* they *legislated* this *Order*, as well as *after* it, were evidently obtained by duress upon their will. Of their pusillanimity, the Journals have recorded several glaring proofs.

For example, they attempt a compromise, when the Commons are goading them to the impeachment, and refusing to let them *bear* the defence in bar:—They *recommend* his banishment, and send them a bill for that purpose, to which the Commons reply in a Bill of attainder,

attainder, if he should not appear upon a given day :—The Lords are terrified ;—they pass the Bill ;—and it obtains the Royal assent.

In one of their conferences, 12th April 1679, they meanly congratulate the Commons upon the point they had carried in this very doctrine of continuing the Impeachment, as if *they* had helped them to it ; which unquestionably was true. The Commons answer with more spirit, than veracity (but spirit is often better—in politics), “ That it was a *Right* for which, they did “ not thank them, founded upon *the course and* “ *usage of Parliament !*”—*splendide mendaces*.

In this conference *Lord Shaftesbury* (the wickedest, and the ablest of incendiaries) takes an active part ;—he contradicts *the Lord Privy Seal* ;—takes the popular side (with his tool the *Duke of Monmouth* \* at his elbow) in favor of the Commons, but with some degree of management, as he was then tampering at Court, where he and his party, then most inveterate enemies to the *Earl of Danby*, upon the 21st of that very month, were admitted with open arms into the King’s new Council.—What hopes for the *Earl of Danby* then ?—But indeed what jus-

\* They often remind one of the *Cardinal de Retz*, and the *Duc de Beaufort*.

tice was ever done to him for an imprisonment five years in the Tower, without prosecution, by those who turned a deaf ear to his demand of it, and punished him in part without hearing him, by the imprisonment itself.

But is it unfair to mark, with how much dissingenuity they delivered him up to the rage of the times, (little short of a national delirium,) against the *Popish design*, that political fable (of *Lord Shaftesbury's* contrivance, as it is generally believed), which began, continued, and ended in a system of the most complicated perjury that forms of justice ever sanctified, and of murder the most atrocious that ever had the mask of judicial solemnities?

But let us take the impeachment itself, and read the fourth article of it, which imputes to him—"That he is *Popishly affected*, and hath  
 " *traiterously concealed* the late *horrid plot*;—  
 " that he hath suppressed the King's evidence,  
 " and hath discountenanced the witnesses."

In the very first reason against even *bearing* him upon his pardon, the Commons tell the Lords—"That *his* use of it, and the long protestation by which he introduces it, are an  
 " aspersions upon the King, as if his Majesty  
 " had commanded or countenanced his crimes,  
 " *particularly*

“ *particularly* that of suppressing and of discouraging the discovery of this plot.”

If it be said, (and it *may* in part be said with truth,) that all this was thrown in as an “ auxiliary, but the *main* offence was the sale of his master’s honor, and regal trust, proved against him by his own Letters;” what a foul character does it give to this prosecution, that it should have been so tainted by those invidious topics, and prejudices, for the purpose of heightening the popular odium to which he was then devoted!

In truth, all the *other* articles (except that respecting the sale of the Peace) are so loose, and flimsy, that not only the Lords did right in refusing to commit him \*, upon charges, which, if true, were no treason; but as to these *other* articles, might have refused to act upon them, as having no solid ground of any kind, even for the charge of misdemeanours.

It is curious to observe, that in *Mr. Poule’s* † accusing speech to the Commons, he charges him

\* Yet the same Lords passed a Bill of attainder, to make him appear, though at first they would not commit him.

† This gentleman has the honor to be much distinguished in the correspondence between *Barillon* and *Louis XIV*, as being high in the list of those who, through the Ambassador, were in  
a secret



him with seven crimes; but this “*concealment of the Popish design*” is not one of them. Nor should it be omitted, that upon reading two Letters of this Earl, revealed by *Montagu* (who acted in part\* from pique to him for his preference of *Sir Wm. Temple* †), and Letters which convicted him of tampering with French money (payable

a secret conspiracy with France at this very period; and “*the ruin of Danby*,” one express arrangement. For his activity, and address in that work, he received, between the 22d of Dec. 1678, and the 24th of Dec. 1679, 500 guineas.—*Dalrymple*.——*Plato*, in his Republic, has punished those with death who took presents, though to execute a duty.—There was no such law for the *Whigs*, and *Patriots* of 1678.

\* It appears, upon unquestioned proofs, that *Montagu* was bribed by *Louis XIV.* for this prosecution, and received money to corrupt the House of Commons, or the leaders of it, in order to animate their support of it: *Barillon* states the whole design, in a Letter of Oct. 24th, 1678.—“ If he (*Montagu*) ruins *Danby*, in six months, he is to have either 100,000 crowns in hand, or 40,000 crowns annually, upon the *Hôtel de Ville*, or a pension of 50,000 crowns for his life.”—“ The deed is done,” said *Montagu*, in a Letter to the King’s minister at *Versailles*, dated Oct. 26th, 1679.—“ Pay me for it !” —No ticket-porter could have made a more cool demand for the delivery of a hare. “ It has been done eight months ago, and has cost me 60,000 crowns.” —I give the substance of his Letter.

† This *Abdiel* amongst the evil spirits of 1678, having been told, that “ *seeming to believe this plot, would be useful*,” found it was a scene in which *he* could not be an actor.”

however

however to the king, and one of them having at the bottom of it, “ this by *my order*, C. R.”) for the Peace of *Nimeguen*, the House at once determine to impeach him upon that evidence *alone*. This, upon the 19th of *December* 1678; yet upon the 21st of that same *December*, in the very articles themselves, drawn up with *Montagu’s* help, we find the *Papish plot*, and his concealment of it, made a distinct offence of *high treason* against him;—not a shadow of apparent evidence, or explanation, having preceded this article.

- The Earl dwells the most upon this part of the impeachment, with his accustomed address, (for he certainly was a man of talents, though neither an able, nor a faithful minister,) in the House of Peers; because he knew it was the most calculated for prejudice against him, and felt his ground strong under him.

He mentions a very curious anecdote, which is, that his own son, then in the other House, voted for this 4th article, in order to mark the kind of zeal which animated the Commons against him. In fact, it was he, the *Earl of Danby*, who had just laid *Oates’s* narrative before the House, against the King’s express command: and Sir *William Temple* says—that he

3

had

had fallen into the King's displeasure upon that very account\*.

In the very next Parliament, upon a rule taken from *another* Court of summary jurisdiction,—*Castigatque, auditque dolos*,—*Titus Oates*, the most infamous of men, is received, and openly encouraged as an informer against him, “for discouraging the discovery of the “Popish plot.” This inflames the popular clamour.

We mark again their finessè in fastening this Popish design upon *him*, when in one of the conferences, upon the favorite point of resisting the pardon, they express a fear that a similar pardon will be obtained for the *Popish Lords*.

In 1681, *Fitzharris*, upon his trial, having accused the Earl of being privy to *Godfrey's*

\* The King did not believe one syllable of this design; and yet in the end encouraged an open prosecution of it, as tending to refute the imputation of his favor to Popery.—*Temple*.

Upon the 17th of Nov. 1678, the *Duke of York* tells *Barillon*, that he, the Earl, adopted the sentiments of Parliament *against* popery, *to make himself popular*: yet he so contrived as to be hated by the Commons; and when *Barillon* afterwards, Feb. 16th, 1679, gives *Lord Sunderland* a warning against these *popular flights*, the answer which that intriguing Peer gave to him is very significant—“*Vous voyez comment le “Comte de Danbi, s'en est bien trouvé.*”

murder

murder \* (a thing of *stage-effect* †, in *Lord Shaftesbury's* hands);—and though his evidence, (which he confessed, a little before his death, to have been perjury suborned,) besides many external suspicions, was gross in itself, a bill of indictment was found against the earl for that murder, upon the very day that he was to appear in the king's-bench, for the purpose of demanding bail upon his impeachment.

According to *Rapin*, the main view of this prosecution against the *Earl of Danby*, was to make him give up the king, and the *Duke of York*, whom it was their persevering design to accuse, and convict in form, as accomplices in the *Popish plot*; an offence which had been previously not *inferred* against them (by men of common sense) but *represented* as *inferred*, from the obstinate attachment of the duke to that merciless religion, and the king's pecuniary dependence upon *Louis XIV.* He adds, that a belief in the catholic plot was confirmed by these letters, which proved the king a corrupt agent of the court of *Versailles*; and that a fear of *Lord Danby's* “discoveries,” was given out as the sole motive to the pardon.

\* *Dalrymple* has a curious extract from the MSS. of *Lord Keeper North*, respecting this murder:—“A popular fiction was busily circulated, that *Godfrey* had been seen last at *Arundel House*; or, as others whispered, at the *cockpit*; in order that the *Duke of Norfolk* and *Lord Danby* might” (in his emphatical words) “*tofs the fire from one to the other.*”

*Bedloe*, who was twin-brother of *Oates* in perjuries,—“had seen the body at *Somerſet House*,” one of the palaces in which the *Queen* resided.

† The body was, in truth, exposed, as *Antony* exposed that of *Cæſar*, to the populace.

‡ N

Indeed,

Indeed, the commons embark the minister and the king in the same peril; and upon the 22d March, when his majesty had appropriated the guilt of these letters to himself, declaring, "that he would pardon him (the *Earl of Danby*) "ten times over, if it should be required;" they put a very unexampled, but a very just, affront upon him, by taking not the least notice of it \*, and proceeding directly to their demand of judgment.

*Burnet* †, who gives the fairest, and the most rational, account of these crooked politics, that is to be found in the historian's page, truly distinguishes between the real import of *Danby's* letters, and that wild supposition of the "*Popish plot*," as lurking at the bottom of them;—a bottom "*deeper than e'er plummet sounded*,"—if the *Popish design* could be found in it.—He represents them to have been letters that should have stimulated the commons, the peers and the public spirit of all parties in the kingdom, united as one man, into new laws against popery; instead of driving them into wicked, and preposterous accusations of innocent men.

*Coleman's* letters formed a direct evidence of the general design to favor popery:—*They were*,

\* Unexampled insult on the part of the king, in the tone of defiance which accompanied this protection, justified any resentment of the commons against him, which their legal powers could enable them to enforce.

† If any man after *Burnet's* account of *Oates* can believe one syllable that he said or swore, he must believe that *Burnet* himself is the worst of men:—there is no other alternative.

by

by a forced construction, received as proofs of a system in which the *Earl of Danby* took a part; and *his* letters gave more alarm when compared by false analogies to those of *Coleman*: But this iniquity had a further extent. The correspondence of both, viewed as parts of a deliberate plan, was, by a more cruel outrage, tortured into evidence of the “*hellish plot*,” (as it was called,) not only against themselves, but against every catholic, whom the intrigue of the leaders in opposition would select. The perjured *Oates* was always at hand, and in the ready fiction of his brain, would accuse any catholic at a minute’s warning, of an intention *to murder the king*, &c. which intention had been long known to him, the accuser, though hitherto withheld from the public ear. Indeed, it was enough to *accuse* in the lump, credulity often sparing his prolific invention the task of a detailed \*, and circumstantial falsehood.

*Accusator erat, qui verbum dixerat, “hic est!”*

The fallacy, or delusion of the parties, in this cruel, and sanguinary fiction, was to confound the testimonies which appeared in proof against the king, and the catholics, (who were in collusion, though upon different views, for the establishment of popery,) with another design of the most atrocious nature that human depravity could either admit, or invent. It was in proof

\* *Oates’s* discoveries consisted of so many particulars, that, upon that very account, though two thirds of them were falsified, it was thought “*above invention*” to have invented the whole. — *Burnet*.



upon the view of *Danby's* letters, that *Charles the second* was enslaved, in general, by his corrupt avarice, to a *catholic* prince, and a *bigoted catholic*, who hated protestants, and protestants of this kingdom the most.—It was in proof, upon the view of *Coleman's*\* letters, that a general design had been set on foot by the catholics, to favor their own religion—to establish it if they could.

*Oates*, in his written paper, delivered, after the revolution, to the house of peers, represents “ the *Earl of Danby's* letters ;” to have confirmed the general credit of *his* evidence.

I forbear to say any thing further of the popish plot, either taken by itself as a mark upon the times in which the order of 1678 was issued, or as being closely referable, through the catholic peers, to the view, and motives of that order ; nor will I touch, in this place, upon the inhuman use that was made of it in the case of *Lord Stafford*, “ whose *noble blood*, having been shed “ in support of it, has given a force to that “ precedent, which no later authorities could “ have shaken.”

This *trope of eloquence* (but which I heard from a very able man) admitting really no serious answer, and in one's closet rather tempting

\* This unfortunate man, who was executed, *of course*, denied in his latest breath every tittle of the evidence, by which he suffered.—*Oates*, and *Bedloe*, had been the witnesses against him ; as they also were against many others, who were executed after appealing to heaven in a manner equally solemn, against these perjuries.



one's ridicule, is put here as one proof, "*that all which glistens* (in that assembly) *is not gold.*"

By the side of it I would place the congenial eloquence, and *reasoning*, of equal abilities, which assisted in "*shedding that noble blood,*" as a sacrifice to the order of 1678:—"Under favor, what is once upon record in parliament, may at any time afterwards be proceeded upon: It is a sudden objection, but I conceive it hath been often done.

"However, in a case of this nature, when the *life of the king*—when *our own lives*—and *our nation*—and *our religion*, lies at stake, I hope you would make a precedent \*."

But after all, are such times, and such proceedings, and such modes of argument, as these, no stain upon the order itself?—Are they unconnected with it?—Are they only *abuses* of a *legal* power?—Or is the whole system, an abuse, including this pretended judgment as a part of it?—Has it not been proved an assumption of *illegal* power?—And was it not the view of that assumption, to use political intrigue in the most odious form it ever had worn—that of a sanguinary persecution, fed, and cherished by a popular clamour †?

\* *Serjeant Maynard*, as one of the managers;—a revered, and a very honourable name! but his accustomed *ability*, as well as *temper*, deserted him on this trial.

† Upon several of the convictions a shout of joy rung through the court.

If

If it be said, as I have heard, that, in 1685, the *times* were equally infamous, and more cruel, —suffer me to controvert that supposition.

The *Campaign*, as it has been called, is an execrable part of *James the second's* inglorious, and wicked, reign ; but it is more to the *personal* odium of *Jeffreys*, and the king, than a reproach upon the general spirit of the times. What are the savage, and brutal incidents of the western commission, to the murder of *innocent catholics*, prejudged by the parliament, and the people out of doors \*, in a delirium of cruelty ;—the infernal *Scroggs* † at their head, who, in his judicial seat, bullied the witnesses—represented the guilt, as requiring no proof—asserted that catholics, who were upon the side of catholics, had not the same credit with protestants, who were against them—and gave them, when convicted, joy “ of the *masses* that were *to be sung* “ for them !”

*Severity* against the *rebels* was just. The cause had no iniquity ; though in multiplying,

\* “ Those who are subjected by *multitudes* to wrong, are “ deprived of all consolation :—they seem deserted by mankind, and overpowered by a conspiracy of their whole species.”—*Mr. Burke's Reflections on the Revolution in France.*

But what are *multitudes* alone, to *multitudes* trained in cold mischief, by political incendiaries,—armed with *aristocratical*, and *judicial* powers—familiar to the *use* of *perjuries*, and impressed with an idea that even to *shed innocent* (if it was *catholic*) *blood*, was only to repay in kind, that general intention of the catholics, to murder every good protestant, which, though never proved, it was not *safe* to dispute ?

† *Wicked, ignorant, and poor*, are the epithets, by which *Burnet* has compressed his character.

or

or in selecting executions, and in the mode of convicting prisoners, extreme injustice, and cruelty were displayed.

“ But in the popular ferments of 1678 and  
 “ 1679 originate our liberties:—and was it not  
 “ this period that gave to us the *habeas corpus*  
 “ *act* ?”

I agree, that a nobler security for personal freedom cannot be found, than in the acquisition of that law to the efficacy, and spirit of the writ, which had been so often eluded. Nor am I cold in admiring the *bill of exclusion*, which passed the lower house in 1769; nor do I at all deny that *usurpers make very good laws*.—*Richard* for example, and *Cromwell*. But in a comparison between the times we are now comparing, what praise can be given, or I should rather say, what praise can be refused by this happiest of all periods for liberty, the age of 1791, to the bishops (an order of men so often calumniated), for the patriotic stand made by *them* against the *dispensing power*\*; which they, and the public spirit of the kingdom, crushed under their feet? Upon the rock of that resistance was built the *revolution*. It was one of those

\* In the *second Lord Clarendon's diary*, we have a curious trait of *Jeffreys*;—and characteristic of all such brutal tyrants, who, in the hour of peril, and in the act of duplicity, or of time-serving revolt, often give themselves an air of public spirit, which they keep in countenance by the same unpolished manners that accompanied their better fortune.—When he saw that *King James* was ruined, he called *Wright*, the chief justice, “ a *beast* ;”—the other judges, “ *knaves* and “ *fools*.—He was averse to this trial—he was an *honest man*—“ the judges were, most of them, *rogues*.”—*cui sufficeret servus ille vultus, ac rubor, quo se contra pudorem muniebat.*

exalted

exalted precedents, in which (as in the case of *general warrants*), practice, with a colour of *usage* resulting from its age, and uniformity,—but against the essential *principles* of *law*, was resisted by the energies of the constitution—by the common sense, and feelings of men.

As to Mr. *Justice Blackstone's* panegyric upon 1678 and 1679, the use made of it in our debate, convinces me, that *Whigs* are more generous, now, than I have known them, in that assembly, heretofore; and will accept of *any* help which their adversaries in political theory may offer to them. But if “*Blackstone's Commentaries*,” in a political view of them, (take for example his account of the Revolution) constitute part of that library which your friends the aristocracy of the *Whigs* are to consult, I would say, as *Tully* said to *Pompey*—“*Optimatibus tuis nihil confido.*” The time *was*, that in a debate upon such great questions as these, a writer so *prejudiced* upon constitutional topics (to say no worse of it) would not have met with any quarter from the person who quoted him as an auxiliary to his argument.

But it is not the opinion of an elementary, though ingenious, and useful writer upon law that can overcome the obvious inference from historical fact, and record; even if the passage warranted the purpose, for which it was quoted.

Mr. *Justice Blackstone* gives to the period of 1679, the character of an age *presenting* as good a *theoretical constitution*, as we ever enjoyed; formed, however, of the good old materials, which

in general the madness of the times had spared; for except the *habeas corpus act*, I am not aware of a single buttress added by *them* to the *tenement* left them by their ancestors\*.

Having said this of *theoretical perfection*, he admits an infinite number of *practical* oppressions in the period that followed 1679: He calls indeed the whole reign, *sanguinary, turbulent, and wicked*:—nor of his *theoretical perfection*, as it stood in 1679, does he represent the order of 1678 as a part.

As to his *theoretical perfection*, accomplished in 1679, I cannot agree with him;—and I appeal, Sir, to *you*, whether an absolute right of laying aside parliaments was not a *theoretical imperfection* with a vengeance. It was *practical oppression* too; for the last *three* years of that reign. I would also beg to ask of you, if the want of a sufficient guard against the incursions of a *dispensing power*, habitually exercised from the earliest ages of the government, was not another *imperfection*.

As to his *practical oppression*, the *whole* proceeding against the *Earl of Danby*, at whom the order of 1678 was levelled, and the *order itself*, constituted glaring parts of it.

\* I am aware, however, of a merit which they certainly had, in removing some of the old appendages to the *castle*; which had been kept up for state, and were become dangerous to the tenement. [See the act for the abolition of military tenures, of purveyance, and pre-emption.]

But after all, there is extreme fallacy in the argument, that credit is due to a particular measure, which is questionable in itself, to say no worse of it, in times of the most violent *faction*, to say no worse of *them*, because in those times a good law was made.

The writer of *Historic Doubts* upon the fabulous, and theatrical, monster that has been made of *Richard the third*, had better arguments for the check which his ingenuity gave to this exaggerated picture, than arise from the good laws which that usurper made.

But, on the other hand, if a law is made, which is *declaratory* upon the face of it, and the legislators are the only witnesses in its favor, let it be supposed, that I discover *them* to be corrupt, and sanguinary persecutors of the individual, at whom that law is pointed. Can I put faith in it \*?—If in the *motive*, and *use* of the measure, I discover nothing but selfish oppression, I suspect the *measure* itself—if I perceive trick in the *mode* of bringing it forward, and precipitation in the *time* given to colourable enquiries; but above all, if I discover an absolute *falsehood* in the recital, and can prove, that in the single ground *alleged* for it, there is not a colour of analogy;

\* “ *Inter arma silent leges*, ”—applies itself to a civil war, in the field: but the political discord, which is upon the verge of a civil war, is guiltier still. Amongst *those* arms, the law is not “ silent ”—but, which is a heavier calamity—*bought* and *sold*.

—more



—more still if I see it refuted by irresistible analogies, and principles of Law, I turn from it with scorn, and refuse my allegiance to it.

I have here supposed the Order of 1678, made in truth by the House of Commons, that is, by their influence upon the House of Peers; a conclusion which I would resist, if I could. But “*Socrates*,” and “*Plato*,” the Commoner, and Peer of that age, must forgive me, if “*Truth*” outweighs both of them in my esteem.

Indeed, as to the *Peers*, it seems a measuring cast between the option, which I may, in candor, indulge to them, of this *passive obedience* to the Commons, in framing the *Judgment*,—or of its *original* sin; as it stands upon ground, which is most insidiously alleged, and which they must have known to be false.

I have the honor to be,

S I R,

With great respect, &c.



## LETTER THE SEVENTH.

— sublatò jure nocendi.

HORACE.

S I R,

“ **T**HE influence of this Order and Judgment upon Courts of Law,” has been adduced as a powerful argument for the *legal* authority of it, or, at least, before the Order of 1785 had issued. In particular, the *Earl of Danby’s* long imprisonment has been quoted as proof, that it was an Order built upon sound principles of *Law*, or that it was made impregnable against every law, but that of Parliament, by ramparts of the Constitution; as it met with such respect from the Judges in *Westminster-hall* upon that Earl’s repeated applications to them for *bail*.

Above all, and with more plausibility, the Report, in *Carthrew*, of *Lord Salisbury’s* fruitless petition for discharge, or bail, to the Court of *King’s Bench*, after the Parliament, in which he had  
been

been impeached, was at an end—*after the Order of 1685* had issued—and *after the Revolution*, has been pressed as a decisive testimony in favor of the doctrine, “ That impeachment is never  
 “ terminated by the dissolution, or the natural,  
 “ and regular end of the Parliament, in which  
 “ it was begun.”

*This* Letter will contain my answer to such parts of the objection as confine themselves to the period between 1678 and 1685: the *next* will take up, and close, the discussion of *Cart-  
 thew’s* report.

Before I address myself to the *application for bail* in this earlier period, I beg leave to remind you of a memorable *fact*, and *precedent*, which intervened between the date of the Order in 1678, and the *Earl of Danby’s* first application to the Court of King’s Bench for bail; though after *Lord Stafford’s* vain petition for it in the same Court—after his trial—and after his execution.

This *fact*, and *precedent*, will evince, that Courts of Law held the Order of 1678, as having no legal weight, or credit; and, at least, as forming no general authority, which could bind the regular justice of the kingdom.

I allude, Sir, to *Fitzbarris's* trial in the Court of King's Bench, upon the 27th of April 1681;—to the arguments upon the discussion of his *plea*;—to the point which *he* assumed, and the *Attorney-General* admitted;—each, in a different mode, completely discrediting the Order of 1678.

It is well known, that he was impeached by the Commons, in order to be saved from an indictment, and reserved ultimately as another *Titus Oates*, with a view to the further attack that was in train against the *Duke of York*;—that his impeachment was rejected by the Lords;—that complaint was made by the Commons against that measure, as “an obstruction to the justice of the kingdom;”—that all were menaced, who should proceed against him at law;—that he was indicted, however, after the dissolution of that Parliament;—that he was arraigned upon this indictment, in the Court of King's Bench, and pleaded in vain a “*depending impeachment*;”—that he was convicted, and executed.

*Burnet* says, that his plea failed him, because his impeachment had been rejected by the Lords. But the historian is deceived; and it was, in fact, refused upon the single ground, that his allegation of the depending impeachment,  
upon

upon which he relied, in bar to the indictment, was *formally* incomplete ; the Judges *gravely* insisting, that as to the *fact itself*, or, in other words, the *substance of this plea*, they had nothing to do with it.—A paradox, grounded upon the most abject fear !

But upon the *validity* of this plea, either in form, or substance, I shall hazard no opinion ; and have recourse to it for a very different purpose ; that purpose will soon unfold itself, and, if I am not much deceived, will strike the reader as an object of his peculiar attention.

It is, amongst other topics, thus argued by *Williams*, the leading counsel for the culprit.

“ It appears plainly upon the record, that  
 “ this Impeachment *was* depending *before*, and  
 “ it *does not* appear but that now *the Parlia-*  
 “ *ment is in being*.——I take the substance of  
 “ our plea to be this:—Here is a person im-  
 “ peached in Parliament, by the Commons, for  
 “ High Treason, before the Lords ; and, for  
 “ aught that appears upon the record, *that*  
 “ Parliament *is in being still*.”

The *Attorney General* makes this answer:—

“ They object, we have admitted here, that  
 “ there is an impeachment ;—that we have ad-  
 “ mitted

“ mitted it an impeachment for the same matter ;—*and that we have admitted the Parliament in being.*

“ Indeed, if we have admitted *the Parliament in being*, it would go hard with us ; *and, if not so admitted*, Mr. Williams’s argument falls to the ground.—But no fact is admitted, which is not well pleaded, &c.”

He then makes the point,—“ that a dissolution of Parliament requires no proof ; and that every Court of Law takes notice of it, without averment, as of a notorious fact.”

The whole scope of his argument conveys the idea, that “ if an impeachment ever existed for the same offence against the culprit,” (a fact which *he* thinks ill-pleaded) “ *it is no longer depending*, after a dissolution of the Parliament.”

Jeffreys, who follows him, has these remarkable words :—“ Whether the impeachment did not fall by the dissolution ;—*it is not admitted that it did not*, but it is waved, as not being pertinent.”

Another very important circumstance occurs upon this trial—important in itself—important *ad hominem*, with a reference to the actor in it—

a mark of the infamy due to the whole transaction—a decided proof, that when the object was attained, in my *Lord Stafford's* death, and the *Earl of Danby's* ruin, this order of 1678 was considered as a judgment *functum officio*, and laid upon the shelf.

The second counsel for *Mr. Fitzbarris* must not be overlooked—*Sir Francis Winnington*. He was the most furious partisan for the commons, against the *Earl of Danby*, and the Popish lords. He attended most of the conferences upon *Danby's* impeachment, and was the boldest incendiary of his time. Having been solicitor-general during a part of this ferment, he was removed from his office, and fell into the *Duke of Monmouth's* corps. In that situation, he was a manager of *Lord Stafford's* impeachment, and exerted peculiar activity in the oppression of this insulted, as well as injured peer; who could not even be *heard* against the order of 1678, though in truth it was a judgment of death upon *him*, and a part of the judicial proceedings against him, behind his back;—though it never had been acted upon, so as to put any culprit upon his trial, but himself;—though it had not been upon the journals two years;—and though, if he could have been *heard* upon it by his counsel, not one of his grey hairs could have been touched.

The managers, as if to goad him by the ridicule of their conduct (and most of them, to their shame, were lawyers), either affirmed what they knew to be false concerning it, or dissembled an ignorance of it, and surprise at the objection; or with-held it as an *arcanum imperii*, never to be developed by vulgar eyes; or made no scruple to aver the necessity of a *new precedent*, commencing at the execution of this culprit. *Winnington*, however, who knew the order well, affirms that, "it was *deliberately* made, upon a "search of *all* precedents in *all* ages."—The most atrocious falsehood that a court of justice ever heard, but which *this* court heard without reproof, though every judge present must have known its falsehood, in one part of it; and every judge who had been a *lord committee*, must have known, that nothing was more false than the rest.

Yet this identical *Sir Francis Winnington*, arguing upon *Fitzbarris's* trial for the continuance of an impeachment after a dissolution of parliament, reasons upon loose, and weak analogies, *but without a hint at the order of 1678*:—"I "contend (said he) that whether the parliament "is in being, or is at an end, the impeachment "is depending, with all its energies."—And how does he maintain it?—By the order of



1678?—No, it is not once *named*; though to *name* it, would have determined *Fitzbarris's* plea to be good in substance; and though to name it with respect, would have done honor to that Parliament, which his political bias would have prompted *him* to honor.—Did he maintain it by some one of those precedents “in *all ages*,” which had been searched *three* little years before, when he was keen in the pursuit?—By not a single precedent, of any kind, except the solitary one of *Berkeley's Case*, not in the report of 1673—not an impeachment, but a very unaccountable proceeding, by which that culprit was tried in Parliament before a jury—was acquitted by them—and then bailed for his appearance at the next Parliament, *ad audiendum judicium*, &c.

We recollect, that he was manager in *Lord Stafford's* trial, THREE MONTHS before this indictment;—yet of that case too not a word!—though he was in the act of attempting to sustain the *very point* for which the “*noble blood*” of this Peer had been shed.—Is it unfair to say, that he was ashamed of *that* proceeding too, and before *Lord Stafford* was cold in his grave?

The result of this transaction is, that after the lion was *dead* (or had begun his *nap*, according to the modern doctrine), the parties and their counsel, by common assent, *chose* to *forget* this

Order of 1678, or laid it aside, as if all its powers fell, when that corrupt, and factious Parliament was no more. They seem to laugh in one another's face, as the Roman augurs did, when they met, and were not in office.

The leading advocate for a culprit, who was the favorite of the Commons that were "*only asleep*," has nothing to say for the continuance of an impeachment which they had preferred, but this:—"It continues, because the Parliament is in being still, *upon record*; as the *Attorney General* has not counter-pleaded the dissolution of that Parliament, which all of us know to be the fact."—But why did not he argue thus (a doctrine more to the point, and more judicious for his client):—"The impeachment is depending, because it has been carried up to the Lords; and, after a dissolution of Parliament, all impeachments are depending, by the law of the Peers, made in 1678?"

Perhaps the best clue to this very singular fact, would be that supposition which I have already intimated, *viz.* that by this Order of 1678, the Lords pointed only at those individual impeachments, and left the general question, or the fate of any *other* impeachment under new circumstances, afloat.

I have

I have called it as it now appears, not only a *fact*, but *precedent*; and though in *strictness* it cannot reach the latter description, in *sense* it can; for that, may in *sense* be called “*precedent*” against the weight, or credit of any judgment, which proves, that in *recenti facto* the judgment itself, and where it might have turned the balance, is neither quoted in the public trial of an indictment by him who had the interest of his *life* at stake in it, nor suggested in his favour by the Court who tried him.

The inference must, upon the whole, be this: Either the Order of 1678 was given up on all hands, as the political, and fleeting expedient of a day, for a party-object, or as pointed singly at *those* impeachments, to which it expressly referred, and at *their* peculiar condition.

This last alternative might also account for the continued imprisonment of *Danby*, after *Fitzbarris’s* trial (for the Order might still have its force against *him*, as falling directly within the reference of it); if other ways of accounting for that imprisonment could not readily occur, without prejudice to the general doctrine “that  
“impeachments, after a dissolution of Parliament,  
“do at this day, *legally*, and *constitutionally* abate.”

“ But

“ But if the Order was not imperative upon  
 “ the Constable of the Tower, why continue  
 “ his imprisonment one day, when the Peers no  
 “ longer exist as a Court?—why refuse to  
 “ bail him at the instant, but under the idea of  
 “ a coercive authority over him, resulting from  
 “ the impeachment, which a future “ *organ of*  
 “ *the people*” will, or may resume?”

The argument conveyed in this question, is more specious, than solid.

First, the refusal of bail to the *Earl of Danby*’s frequent, and goading importunities, appears to have been the effect either of cowardice, of servility, of corruption, or of prejudice against him, with a reference to the Popish plot; from which prejudice, none were exempt, or would have owned it if they were. I have stated the effect that *Fitzbarris*’s perjuries, after his conviction, threw upon the original credit of *Danby*’s concern in *Godfrey*’s murder. In the meantime, the Order of 1678, pointed, and clear with a reference to the *Earl of Danby*’s impeachment, hung over the Courts of Law; so that it became extremely difficult for them, in such an age, and such men as they were, to accept *his* proposition of bail, though in a case, which,  
 upon

upon the soundest principles of their discretion, fairly, and irresistibly called for it.

*Jeffreys*, however, took upon him the risque of bailing him ; and it is an act, which, in my opinion, does him infinite honor ; let that monster of cruelty and of injustice be vindicated, and even commended, where he deserves it.

Will any man contend, that a commitment by the lords for high treason is notailable with strict propriety, if the charge upon which the commitment is founded, contains no such offence, though it gives that *name* to something else?—or, can it be said, that if the charge *had* contained high treason, there was not ground for bail in the duration of *Lord Danby's* imprisonment, and the tacit *waiver* of his prosecution ?

In the case of *Lord Stafford*, applying for bail, the court of *king's-bench* observed,—“ that he  
 “ was committed for high treason, by the lords;  
 “ —that commitments for high treason upon  
 “ impeachment, were not within the *habeas*  
 “ *corpus act*, and consequently notailable *de*  
 “ *jure*, for want of prosecution ;—that it be-  
 “ came therefore a mere point of *discretion*, and  
 “ that upon *their* discretion, they did not think  
 “ it proper to bail him.”

“ But why *not* within the *habeas corpus act*,  
 “ if the impeachment was not still in force?—  
 “ for could not he have argued thus?—“ The  
 “ impeachment being at an end, I could have  
 “ been indicted;—I have not been indicted, or  
 “ tried, as the act prescribes;—I am, therefore,  
 “ *de jure* bailable.” The answer is, that he  
*could* not have been indicted or tried at law  
 upon *this charge*, and at the suit of *this pro-*  
*secutor*.

They *could*, in *Stafford's* case, have said:—  
 “ Our discretion prompts us to *bail* him.”—  
 If they *could*, let me ask, if the discretion of  
 courts, either to bail, or to remand, is not, of  
 itself, decisive to shew, that it is not the *im-*  
*peachment*, but the opinion of these courts  
 alone, that between parliament and parliament  
 either detains, or bails, or liberates the culprit.  
 If *that* be conceded, as I think it must, I  
 would then observe, that our constitution is not  
 apt to do things by halves; and the idea that  
 a court of law may defeat an impeachment for  
 high treason, by setting the culprit free, if the  
 parliament is barely *adjourned* (which is a right  
 at law, clear of doubt) proves *à fortiori*, that no  
 house of peers can have the least controul over  
 an impeachment, after “*the new court*,” (accord-  
 ing to *Chief Justice Rolle*,) by which alone  
 they

they sit has been dissolved;—that is, when the parliament itself has met with a similar fate.

Here, at least, is a dilemma that requires a very serious, and a very accurate solution.

Either the right of bailing in the court of king's-bench, after a dissolution of parliament, a culprit impeached by the commons, and imprisoned by the peers, affords evidence, and proof, that after a parliament is at an end, there is no depending impeachment;—or admits that there is.

If the *first* be the result, there is an end of *that* question.

If the *latter* be a more correct inference, what can be a more glaring *precedent* (if I may use the phrase) of that *jealousy*, which in my first letter I described as the ruling spirit of our constitution? for here, then, will be another admitted check upon the *indefeasible* right of the commons to impeach *with effect*:—a right, which is more dangerous, in my view of it, than a right of dissolving an impeachment, by the dissolution of a parliament, which is *denied*; or the right of bailing the party impeached in the courts of law, which is *admitted*. Both of these rights are formed upon similar analogies, and are both of them liable to extreme abuse;



with a material difference, however, in point of responsibility between them; for the dissolution of parliament is an act which can be met, and resisted, if it was an abuse of the regal trust, by the next house of commons; but, "*robes and furred cloaks hide all.*" The court of law would have only to say—"It was for our pure discretion to bail, or to remand him; and our discretion prompted our judgment,—our conscience to bail him."—What house of commons can touch them for it?

Here, too, is another, and striking proof, that *Mr. Burke* is more afraid of lawyers, and the law, than our constitution is, which resigns to *them*, even during a petty adjournment of the legislature, a power of releasing *their* suitor from that state-prison which alone ensures his appearance, which alone compels him to abide a just prosecution as a delinquent of state, accused by the whole commons of the realm, before the peers of the realm, in their judicial court, for, perhaps, the worst of all political offences; though not of a kind which the regular habits, or powers of law would reach with effect,

I have the honor to be,

S I R,

Yours, &c,

## LETTER THE EIGHTH.

Non modo eventus rerum, sed ratio, causæque noscantur.

TACITUS.

S I R,

“ **W** HAT shall be said (we are asked)  
 “ of the applications for bail, and fruit-  
 “ less applications too, in the court of king’s-  
 “ bench, when the order of 1685 had been put  
 “ upon the journals? Why did the two catholic  
 “ peers, *Lord Peterborough*, and *Lord Salisbury*,  
 “ continue to be imprisoned *one day*\* in the  
 “ tower, when the commons, who had *im-*  
 “ *peached* them, and the peers, who had *com-*  
 “ *mited* them, were no more?—Why did *Lord*

\* This question has not the merit of originality ;—for the dilemma which it endeavours to impose upon the argument, was also attempted, but without effect, in *Streater’s case*, more than a century ago, by the attorney general: “ If the “ order die (said he) by the dissolution of parliament, the “ jailor should then have set open the door:” And he recommends an action against him.—Yet the party, who had continued *in vinculis* under that order, was liberated by the court, upon the single idea that no order existed, or could be resumed. This too is the more striking, because the *court of the parliament* then resided in the commons alone, who had also in themselves *the legislative power*. But an “ *order of* “ parliament,” and an “ *act of parliament*,” were distinguished by the court; nor was the effect of a dissolution upon either of them at all varied in the opinion of that court, by the accident of usurpers in the *legislative* or *judicial* power.—The old analogy remained, and was affirmed with spirit by a court of law.

‡ Q 2

“ *Salisbury*

“ *Salisbury* ask for bail, in the court of king’s-  
 “ bench, and ask for it in vain; that high  
 “ court not even condescending to *name* the  
 “ order of reversal in 1685?—And why did  
 “ *Lord Chief Justice Holt*, in a later case, de-  
 “ clare, that impeachments continued between  
 “ one parliament and the next?”

I shall give a distinct answer to every one of these questions.

*First*, If it were true that impeachment *so far*  
 “ depended,” after the end of a parliament, as  
 to continue the *imprisonment* of the culprit upon  
 that ground alone, subject only to the discretion  
 of bail; it would not follow, that it would there-  
 fore “ depend” for another, and a very different  
 purpose—that of proceeding upon the same im-  
 peachment against him, and putting him upon  
 his trial in the next parliament; unless the *usage*  
 were equally established in both of these acts, or  
 the *analogy*, irresistible between them.

The *next* observation is, and, as it strikes me,  
 a complete answer to this corollary, which has  
 been drawn from the continuance of *prison* to  
 that of *impeachment* for all its *other* purposes;  
 that an order to imprison, made by a power legal  
 at the time, upon a legal charge, binds the  
 custody of that culprit, when the power that first  
 committed him has no further controul over  
 him, till he can be legally discharged by some  
 course

course of trial,—or can demand bail *de jure* within the *Habeas Corpus act*,—or can obtain it from the *discretion* of those to whom the law refers him. That celebrated act (which, by the way, is very ill drawn—*tantamne rem, tam negligenter agere!*) gives no special power to the courts of law over a warrant that has treason or felony in it, “plain “ and special,” unless where a term shall have intervened, without indictment, and without just apology for the delay;—or where another term has also intervened, without indictment or trial.

The act, therefore, does not reach imprisonment by the lords for high treason, plain and special upon the commitment, if the party so committed has been *impeached*; because he is no object of trial by indictment *upon that suit*;—as I have before observed.

Thus, when *Lord Stafford*, who was clearly within a direct, and express view of the order 1678, applied for bail, after an imprisonment of two years, to the court of king’s-bench; they refuse to bail him, upon their discretion (explained as I have already intimated), and, as they express it themselves, “*without any reliance upon the order of 1678.*”

Therefore, as being imprisoned, *all* these peers, with, or without reference to *either* of the orders, before 1685, or after it,—were liable to that im-

prisonment, as being legally charged, and legally committed; unless they could satisfy the court, that bail ought, in justice, to have been accepted.

But we are then told, “ In *Cartbew’s* Report, “ of *Lord Salisbury’s* application, the order of “ 1685 is not once *named*; and bail is *refused*, “ under circumstances which prompted every “ idea of a rational discretion to *receive* it; unless the court had thought it competent for “ the house of peers, then adjourned for two “ months, to resume this very impeachment, “ by *their* discretion. For if the impeachment “ was at an end, and therefore *could not be* resumed, what species of discretion was it in the “ judges of this court, that kept this peer in “ jail, for the sake of keeping him there !”

As this objection is very ingenious, and colourable—as these too were times in which the liberty of the subject held up its head, begun to *renew* its rights, to *feel* them, and act upon them, it becomes necessary to vindicate the conduct of the judges in that court, and account for it; though in strictness it would be enough to say,—that if their discretion was abused, it would be no evidence that an impeachment was “ depending” against the *Earl of Salisbury* then; or is depending now against *Mr. Hastings*.

It appears from *Cartbew*, page 131,—that *Lord Salisbury* was impeached by the commons  
for

for high treason;----that he was committed upon that impeachment by the house of peers, to the tower;—that he continued there, till that parliament was dissolved, and a new one had been called; which after a long session was adjourned for two months, at the very time of this application for bail or discharge to the court of king's-bench.

It was made upon two grounds:—

He insisted *first*, that he ought immediately to be *discharged*, as having been pardoned by the act which had passed in the last session of parliament.

But as there was no proceeding in court, upon which this plea could be founded, the judges, who could not judicially take notice of the act, unless pleaded with necessary averments, refused the *discharge*, as claimed upon that single ground of the pardon.

Then it was moved—that *bail* should be accepted for him; upon a reference to the *Earl of Danby's* case, who was bailed though committed for high treason, upon impeachment:—The court refuse to *bail* him:—

“ Because there was a short adjournment of  
 “ the existing parliament, and because he should  
 “ apply to the *peers*, for his bail.”



“ The *Earl of Danby* (they tell him) was  
“ bailed, because the parliament of those days  
“ was *prorogued*, the time left uncertain for its  
“ meeting again, and he had no prospect of an  
“ application there.”

The case of *Lord Stafford* was also mentioned  
by the court, as proving, “ that commitments  
“ by the peers in parliament, are not made  
“ void by the dissolution of it.”

It is also intimated, “ that when the *Earl of*  
“ *Danby* was bailed, the recognizance bound  
“ him to appear at the next session of parlia-  
“ ment; which condition affirmed the commit-  
“ ment, and proved the opinion of the court,  
“ that it was not avoided or discharged.”

This is the full effect of *Lord Salisbury's* case,  
in *Cartbew*, and stated with punctual accuracy  
in all the essential points of it.

The consequences of it have been argued  
thus :

“ At this time, the court of king's-bench  
“ looked upon the reversing order of 1685, as  
“ of no effect in law; for, else, they *must* have  
“ *liberated* the Earl upon the single ground  
“ that his impeachment was at an end.

“ The



“ The notice taken by the court, of *Lord*  
 “ *Stafford*’s case, and the anxiety which they  
 “ shew to point out, that even in the act of  
 “ bailing *Danby* his commitment was affirm-  
 “ ed, strongly indicate one or other of these  
 “ propositions : a perfect ignorance of the  
 “ order in 1685 ; or an opinion, that upon  
 “ that order they could not act in their judicial  
 “ character. Either of these alternatives throws  
 “ a shade of legal discredit upon the order of  
 “ 1685, in that enlightened period, which  
 “ makes it impossible for a lawyer in this age  
 “ to utter one syllable more in its favor.”

It must be confessed, that in the report, no  
 mention is once made of the *order in 1685* ;  
 but it should also be confessed by the partisans  
 for the *order of 1678* (which alone they set  
 up against that of 1685), that a similar fatality  
 had buried *that* order too in legal oblivion,  
 if the silence of this Reporter upon either of  
 them is fatal. The court (according to *him*),  
 even the act of stating the applications for bail  
 made by the *Earl of Danby*, at whom the order  
 was levelled, clearly disown the effect of it upon  
 them, as keeping *Lord Salisbury*’s impeachment  
 alive ; but consider the case just as if no such  
 order had ever issued : leaving it entirely afloat,  
 whether a new parliament, or a new session,

‡ R

could

could or could not proceed against *their* suitor, the *Earl of Salisbury*.

I cannot forbear, however, to conjecture, that even if the order 1685 *had* been mentioned by this Earl, and had been expressly made one of his grounds for the *discharge* which he solicited, the court, attending to all the circumstances, would have doubted, whether a sound, and a judicial discretion would have authorized them to comply with his request.

I am also of opinion, that a refusal to comply with it, could not even in that period have been fairly interpreted as a disavowal of the order of 1685 in its general effect; if mentioned, and pressed by the Earl himself.

Much less could it be so considered at this time of day, by those who are *willing* to remember, and weigh dispassionately, all that has happened *since that period*.

It is true, that when the court argued upon the case of *Stafford*, and of *Danby*, the order of 1685 might have been set up, as counteracting, and as annihilating the general effect of those precedents: but would not they have been justified  
by

by the conduct of *Lord Salisbury* himself, in a *doubt* whether the order of 1685 *had* the effect which he would then have challenged, but *so late in the day*, I mean *for him*?

They tell him—"the house of lords was "*the best place for his application.*" Of that, and of the other house there had been "*a very long session;*"—a fact which is particularly noticed in the report. If the earl *had* applied in that session, would not the court have naturally inferred, as he remained *in vinculis*, that bail had been refused him by the peers?—and if bail *had* been refused him *in that place*, would it not have shaken the authority of the order 1685?—If he had *not applied*, would not the continuance of his imprisonment and his own forbearance to apply in parliament, when the peers were sitting, call upon the judges in the court of *king's-bench*, to *hesitate*, before *they* determined that an order, apparently so little *respected* by those who made it, and so little *trusted* by those for whom it was made, had really destroyed the effect of those two precedents in *Westminster-hall*, which *they* had quoted as affirming the right of a continued imprisonment, or at least, of bail for the security of appearance to a charge, that *might be resumed*?

Besides, if the *Earl* had forborn to attempt his own relief, by asking the opinion of his own peers in their judicial character, *during a long session*, would it not have been a very safe discretion, if the court, in answer to his precedent of 1685, had said—"it is a very short adjournment; ask the lords what effect *they* ascribe to this judgment of their own!—*You*, and *they*, together, have made the validity of it ambiguous to *us*, and have made it peculiarly fit that you should yourselves together settle the doubt."

But the main question is, what the lords *finally did* in the case of *Lord Salisbury* himself, upon the chapter of this very imprisonment.

If in that very case *they* acted judicially, upon a marked principle, which assumes the termination of an impeachment by an end of the power that impeached, and the termination of an imprisonment by an end of the power that imprisoned, *they*, who are the best, and supreme authority, have cleared up, in the very same cause, any doubt which might have been entertained upon the *Earl of Salisbury's* recent application to the *king's-bench*. They have consigned all that was done *at law* in those cases of *Danby*, (who indeed had been also discharged in 1685,  
2
by

by a judicial act) and of *Lord Stafford* himself, to legal oblivion.

That, in fact, the house of peers *finally discharged* both of these catholic peers ; asserting, in a *judicial form*, or at least with a judicial *act* and *effect*, the dissolution of *Lord Salisbury's* impeachment, the following letter I think will prove. If it should, let the authority of parliament, in *Lord Salisbury's* case, as well as in other precedents, that accompanied or followed it (and which at present I will not anticipate), be opposed against the authority of the *king's-bench* in that case.

The court of law, in those days, (fastidiously, as the house of commons may look at a journal of the lords in this triumphant hour of *privilege*,) meant in *Lord Salisbury's* case, to be ultimately governed by the *judicial opinion* of the lords ;—and if it can be made out that by that *judicial opinion* the impeachment was annulled,—can it be doubted, that at any future period, the court itself *must* have held the authority of their own doubts, upon which they refused the *Earl of Salisbury's* bail, completely done away, and rescinded, by the  
higher

higher act of that supreme, and judicial power  
*to which they expressly referred him?*

It may be further observed, that when they point at *Lord Stafford's* case as the authority upon which they refuse bail, they point at a case in which it appears, that upon that unfortunate person's trial, *Sir William Jones*, one of the managers, affirms, the law which kept his impeachment alive, to have been so declared by the house of peers (alluding to the order of 1678); “and that *being so*,”—two very emphatical words!—“it was become (as *he* insisted) the “law of the kingdom:”—By which he could only have meant, that it was become the law of the kingdom, *because* the peers had resolved it as the law of *their* tribunal. This too appears more evident, when he gives to the high court, then assembled, his ground of “*hope*” (as he calls it,) that the commons were authorised by good reason, to act upon the impeachment;—which ground he describes to be,—“that the “lords had thus declared *the law* of *their* “house to the commons.” If the lords then, at a later period, have declared the law of *their house*, and (according to *Sir William Jones*) the *law of the kingdom*, to be the direct reverse, could the court of king's-bench, after  
the

the reversal of the order in 1678;—after the lords, by *acting* upon the order of that reversal, in the discharge of persons impeached, had judicially notified it as the law of their house;—*could* the court of king's-bench, duly apprized of that circumstance, have referred themselves to the case of *Lord Stafford*, as justifying a refusal to bail, upon the order of 1678 alone?—*Could* they have done this, when that very order was no longer a *law of the peers*, and was, therefore, no longer a *law of the kingdom*?

Upon *Lord Stafford's* trial, indeed, *Sir Francis Winnington* urged, with miserably inferior talents, what has been impressed with such energy upon the debate of these questions;—  
 “ that an impeachment was, in truth, an act  
 “ of the commons out of parliament, and was,  
 “ therefore, kept alive by *them*, in every  
 “ change of their elected representatives.”

Whether I have refuted, or shaken, in a former branch of this imperfect essay, that hypothesis; or left it as firm as eloquence could have made it *seem* to be,—the reader will determine for himself,—I am all humility before *him*;—and as to *you*, Sir, I am so afraid of your *wit* (the only form in which I can be significant enough to be honoured with your displeasure),  
 that



that if I can escape even that modest pre-eminence of being "the cause that wit is in other men," I shall feel comfort in the obscurity which enables me to exclaim—" *effugere est triumphus.*"

I am,

S I R,

Yours, &c.

*P. S.* I had forgot the *dictum* ascribed (by those who affect a contempt for the lawyers) to *Lord Chief Justice Holt*. Is it worth answering?—The answer is in a word; but the evidence of it, in a dull, and confused report.

The tenor of *reasoning* there, (if it merits the name,) is in direct opposition to the idea of a continuing impeachment; and the report is absolute nonsense, if *Lord Holt*, in *that part of it*, affirmed the doctrine: for it would make him coarsely, and abruptly, confute himself.

If he had said the direct reverse, a semblance of more uniformity at least, if not of more accuracy, would be given to this report.

The question was—"if a writ of error to the next session of a parliament superseded execution;" *Lord Holt* is made, in the first breath,  
to

to say, that impeachments may continue between parliament and parliament, which he could not *have said with truth*, after the order of 1685, and the consequent act of the peers, had said the reverse, and which he could not *have had occasion to say*, if it was true; because, that very order had continued writs of error to the next parliament. In the next breath, as if to help that first proposition, he cites a case which proves a writ of error *no superseas*, if a parliament is *prorogued*, and of course to *a day certain*, but a term intervenes.

The final result of an argument scarce intelligible, but evidently tending to make the writ of error *no superseas*, in other words, to consider it as *abated*, in that view, tells the parties, with all due solemnity, “ that it leaves them “ to do what they *can at law* ;” which, though not very comfortable words in the sound of them, rather import the idea of a right in the original plaintiff to act upon his *judgment at law* as if the writ of error had not stood in his way.

## LETTER THE NINTH.

— tuus jam regnat Apollo.

S I R,

I AM come to a period, which, in the general date of it, will be sure to command your attention, reverence, and love. The air is pure, and we tread upon consecrated ground.— Was the constitution ever so accurately understood, so religiously felt, and with such a calm dignity of spirit enforced, as in 1689-1690!— The charter of *Runnymede*, had sketched a very animated outline of our liberties.—The \**second* charter of them in the *bill of rights*, brought them home to us, and made them as practicable, without injury to the executive power, as it made them jealous in their checks upon the abuse of it. The vigilance of *two great parties* (lost at an ill-fated hour in the factions that convulsed the early periods of this present reign!) was tempered by a common zeal for the public interest, with shades of difference in the mode of accomplishing it. Not a single measure was careless, or corrupt,

• The *petition of right*, and the *habeas corpus act*, were, as far as they extended, of inestimable value; but, comparatively to the *bill of rights*, they were short, and imperfect.

as heretofore ; but every thing was canvassed, and the jealousy between the two Estates, though it became dignified, had not lost either its acuteness, or spirit.

Under these powerful auspices, in defiance of the most exquisite ridicule that ever enchanted the house of commons, who at any time (if it is not a libel upon them to say it) prefer a good joke to a good argument, I must bring forward Sir *Adam Blair*, and see if *truth* will not once prove that *ridicule* is *not* the *test* of it.

Sir *Adam Blair* (or *Gordon*, if you prefer the name for the sake of the ballad) with certain others who had been impeached by the commons for high treason, was upon the 4th of July 1689, by an order of the peers, imprisoned. Their treason was that of publishing in the month of June, a declaration by King *James* dated in May, by which he half invited, and half bullied the subjects of King *William* into arms against him.

Whether such an offence at this day, constitutes *high treason*, has been doubted in modern times \* ;—but it was at least a high crime,

\* Mr. *Justice Foster* inclines to the opinion, that it would not be *high treason*, unless “ with a reference to some treasonable act then on foot, or intended.”—These are loose words, and the whole passage is very obscure.

and misdemeanor, of the most alarming effect, at so critical a period.

Upon the 25th of October in the same year 1689, the commons first impeached the *Earls of Salisbury and Peterborough*, (then prisoners in the tower,) for high treason.—*Their* treason had no doubt upon it: and as it was the offence of shifting their allegiance to the Pope, it was not likely at such a period as that of July 1689, to be touched with a feeble hand.

The imprisonment of Sir *Adam Blair*, &c. remained as long as the parliament. Further proceedings were had upon it, but no day was appointed for his trial.

The parliament was, upon the 6th of February in the same year 1689, dissolved.

Upon the 20th of March 1689, the parliament is again assembled;—and upon the 1st of April 1690, the *house* resolved “to bail Sir *Adam Blair*.”

The very *next* resolution upon the journals is in these words:

“Ordered—That on Wednesday next this  
“house will take into consideration, whether  
“impeachments continue from parliament to  
“parliament.”

It

It was then ordered as follows :

“ That on Monday next, Sir *Adam Blair* shall put in bail.”

Here, then, let us pause, and observe, that with a reference to the case of *Blair* at the commencement of that parliament, before the imprisoned peers had made any application, the lords determined critically to examine this litigated question, of a “ depending impeachment,” but were either, upon the first blush of it, satisfied concerning it, so far as to bail that culprit, though committed for high treason, or must have ordered his bail upon some *political* discretion of their own (and after they had themselves imprisoned him), *without offence to the commons*.

Upon the Tuesday following, this order is made :—“ That on Thursday next, the house will take into consideration, whether impeachments continue *in statu quo* from parliament to parliament; and also, whether the courts in *Westminster-hall* may proceed in the intervals of parliament, after appeals or writs of error are depending in this house.”

Upon Thursday they order, “ That, on Tuesday next, this house will take into consideration, the state of impeachments, whether

“ they continue *in statu quo* from parliament to  
 “ parliament; and also the report from the  
 “ lords committees, appointed to examine and  
 “ consider, whether the courts below may pro-  
 “ ceed in the intervals of parliament, after ap-  
 “ peals or writs of error are depending in this  
 “ house.”

The *very question* here put, which could not  
 escape the knowledge of those in the other house  
 who were the best friends to the rights of the  
 people that ever sat there, announced a suspicion  
 at least, that the order of 1678 was at an end,  
 or contained bad law. But it gave no alarm,  
 nor was “ privilege” offended by it, any more  
 than it was by the release of the culprit upon  
 bail.

No further steps were taken, and the parlia-  
 ment was prorogued to the 7th of July 1690. It  
 met again for business, upon the 2d of October  
 in the same year.

It must here be admitted, that, from April to  
 July, the imprisoned lords delivered no petition,  
 even after the question respecting the continuance  
 of impeachments had been appointed for dis-  
 cussion upon a day in the month of April, and  
 though *Blair* had been actually bailed. How  
 to account for this, or for the reasons which  
 induced



induced the house to go no further as to the inquiry then, it is impossible for me to conjecture, nor is it very material; for, upon the first day of the parliament, October the 2d, 1690, a petition *was* presented by *Lord Peterborough*, in which, *having stated the dissolution*, and the act of pardon, he solicited that he might be discharged. *Lord Salisbury* also petitioned; and, without stating the dissolution of parliament, relied, as it should seem, upon the pardon alone.

Upon the 6th of October the lords met again; and the judges were asked, whether the offences of these Earls were comprised in the act of general pardon.

They answer "yes," if their crimes were committed before the 13th of February 1688, and not in Ireland, nor beyond the seas.

Upon this hypothetical opinion, an immediate question was put, whether they should be discharged; and the lords resolved in the negative, but resolved to bail them.

*The same day* lords committees were appointed by the house, "to inspect and consider precedents, whether impeachments continue *in statu quo* from parliament to parliament, and having considered thereof, to report their opinion to the house."

Upon

Upon the 9th of October, “ It is ordered,  
 “ that the lords committees, appointed by  
 “ the house to consider precedents, whether  
 “ impeachments continue *in statu quo* from  
 “ parliament to parliament, have hereby power  
 “ given them, to send for the records of the  
 “ several proceedings in the court of king’s-  
 “ bench, relating to the lords lately in the  
 “ tower upon impeachments, upon their mo-  
 “ tions for their *Habeas Corpus*.”

Upon the 10th, “ Ordered, that the lords  
 “ committees, &c. do meet to-morrow, and that  
 “ *Mr. Petyt* attend at the same time.”

This gentleman was a famous antiquarian,  
 particularly tenacious of the rights and “ privi-  
 “ leges” of the commons.

No report was made till the 30th of October ;  
 which is not unworthy of remark, because it  
 proves with how much deliberation the lords  
 had proceeded.

Upon this day (October 30th) *Lord Mulgrave*, having stated several precedents brought  
 from the tower, has these words :

“ Then

“ Then the committee examined the journals of the house, which reach from the 12th Hen. VII.; and all precedents of impeachments since that time, are in a list now in the clerk’s hands; among all which, none are to be found to continue from one parliament to another, except \* the lords’ who were lately so long in the Tower.”

Then followed this passage :

“ After the consideration of which precedents, and reading the orders made the 19th of March 1678-9, and the 22d of May 1685, concerning impeachments; and after a long debate thereupon, and several things *moved*,” (which means, I suppose, mooted or debated; for if they were motions in a parliamentary form, they would appear) “ this question was proposed, whether the two Earls shall be now discharged from their bail?”

“ The previous question was negatived; the main question put, and resolved in the affirmative.”

Is it refinement here, or is it plain, and obvious inference, to conclude from all these passages taken together, that a legal termination of

\* There is one slight inaccuracy in this exception—I shall touch upon it in the sequel.

the impeachment, supposed by the lords to have resulted from a dissolution of parliament, was the real ground of the discharge?

If it was the pardon, how could it operate so long even as ground for bail, and be made afterwards ground for discharge, without any reason assigned, or without evidence of the facts, which alone could make the pardon save those peers?

But, at least, will it be denied, that here the lords, in the face of the public, adopt (though not in express words) the evident *opinion* of their own committee, that the impeachment was at an end?

If the pardon was their ground, they should have apprized the commons of that circumstance.

The entire discharge, under all the circumstances, could only be justified upon the idea of their judicial opinion, that over the impeachment itself they had no jurisdiction; a point, which they, like other courts, were exclusively to determine for themselves.

But what makes the real ground of this discharge too clear for an argument is, that upon the 2d of December, *Sir Adam Blair* was completely

pletely discharged, upon the mere allegation, that he had been ready to appear “ when ordered.” What can this discharge have been grounded upon, but the impossibility of sustaining an order for his appearance when the impeachment was no more?—Here too was a case of alarm to the commons;—for either *Blair* was discharged pending an impeachment for high treason, without any reason upon earth;—or it must have been upon the idea, that his case fell within that of the two lords, which it could only do in respect of the dissolution, for there was no pardon that could apply to *Sir Adam Blair*.

As the catholic peers were first bailed, according to the case, and precedent of *Sir Adam Blair*, upon a general view, and memory of the orders in 1678, and 1685, *Sir Adam Blair* was, by a similar train of reasoning, liberated even from the gentle custody of his bail, when the catholic peers had obtained their liberty.

In the house of commons was your favorite *Somers*, then solicitor-general. Would he have endured even a *suspicion*, that an impeachment should close upon a dissolution, if he thought it sound, and established usage of parliament, that it should not?

A very curious thing appears in the dissenting protest, which in its very first reason does not seem to dispute the doctrine, but rather points at the idea that *others* were to be helped by the introduction of it into the debate; not the two peers.

Here is another tacit, but strong, though negative proof, that it was unexceptionable doctrine.

The reason is unintelligible, if it refers to the pardon; but if it refers to the doctrine as to impeachments, nothing is more clear.

The whole question, as to impeachments, was resumed, according to *Burnet*, with a view to *Lord Carmarthen*, who then became a favorite of king *William*, but was extremely obnoxious in the house of commons. They even threatened the vote of an address, to remove him from the king's council, upon account of his former impeachment; a circumstance, which makes it even more unaccountable, that the commons, upon a similar suspicion to that which the dissenting lords entertained, should not have taken fire at the mode in which the vote of discharge was expressed, leaving it equivocal at least whether it was not upon  
the

the doctrine that impeachments were at an end with a parliament in which they had been incompletely acted upon.

The unquestioned excellence of these times is a powerful argument in support of any doctrines affecting the constitution, expressed or implied by the lords or commons who then sat.

Here too, "*the want of prosecution*" by the commons is not asserted, nor is the impeachment (as in 1701) *dismissed*; but the vote considers it as gone.

I have the honor to be,

S I R,

Yours, &c.



## LETTER THE TENTH.

Ille sinistrorsùm, hic dextrorsùm abít; unus utrîque  
Error;—sed variis illudit partibus.

HORACE.

S I R,

**T**O discuss, with impartiality, the *Duke* \* of *Leeds*'s case in 1701, and that of *Lord Oxford* in 1717, (which are to be the only subjects of this Letter) I shall endeavour to avoid the *extreme points*, and what may be called, even as against *laymen*, the *apices juris*, in both of the opposite arguments; because though ingenuity may refine upon them, it must either be

\* It was archly said in the house of commons, that he was *born to make precedents*; and it is whimsical, that he is always a witness for “ *depending impeachments*.” Before 1685, he is persecuted by a *depending impeachment*, and a law to that effect is *made for him*;—natural enough in those times:—But that after that very law should have been reversed, he should come forward again with a *new* title of honor, upon a *new* impeachment, and be made a witness again for the departed order of 1678, not by a new persecution, but in the very act of being liberated from that new impeachment,—is a most whimsical jump of the atoms!

wilful

wilful; and perverse, or, at the best, very inaccurate reasoning that can give them credit.

But reasoning from both of these authorities—comparing them together—and comparing both of them to the earlier precedents—I shall hope to satisfy the reader, that whatever impression he may have received from the orders of 1685 and 1690, has derived no prejudice from the order of 1701; and has derived advantage from *Lord Oxford's* case in 1717.

It is *the fact*, that in 1701, an impeachment against the *Duke of Leeds* appears to have been dismissed, and for this *one* reason—“ because it “ was not prosecuted ;”—*though a dissolution of parliament had intervened.*

That order, by a young, but ingenious advocate, was considered in the debate as an *adjudication*—“ that notwithstanding a dissolution “ of parliament, impeachments are legally resumed, and proceed.” He told us, “ that “ it was the *last* judgment of the peers upon “ this litigated question; restoring the order of “ 1678 by the reversal of that in 1685,—and “ itself unreversed.” It seemed in general agreed, that he had mistaken these analogies, though he supported them with ability; and  
with

with an impression upon all who heard him, that his errors were those of an acute understanding.

It is a familiar principle of law, though rather implied, and acted upon, than affirmed, that if two points of argument, or fact, are *alleged*, by either of the parties in a suit, or by a culprit in his defence, or by a petitioner in his complaint, as reasons for a judgment of the court, and the court giving judgment in his favor, *expressly* adopt only *one* of them, it is at least no *adjudication* against the legal weight of the other.

Thus in *Fitzbarris's* plea two points arose; one of them was the *form*—the other was the *substance* of that plea. When the court avoided the question upon the second ground (which it was in their power to do) by the nature of their opinion upon the first, and ruled the *form* to vitiate this plea, they did not adjudge the *substance* of it, upon which they said nothing, to be good.

Many reasons may be assigned, why a court with peculiar discretion may refuse to adopt one of two reasons for their judgment, *alleged* at the bar, even if they agree to it, and may observe a dead silence upon it.

But

But even less can the idea of such an *implied adjudication* be ascribed, either by *lawyers* or *laymen*, to a case in which, out of two points in his favor, the party himself *chooses* to allege *one*, and prevails in it; or throws himself in general upon the court, and *they* give *one* reason, which is a sufficient authority for them to comply with his request; uttering not a syllable upon other topics, which might have led them to the same act.

Nay, even if they refuse to adopt *one* of two reasons alleged, and give it as their direct *opinion*, that if it stood upon that reason alone, the party would not succeed, but then do for him what he desires of them, with a reference to the other ground; that first opinion is considered as *extrajudicial*, and the subject of it is just as open to legal discussion as ever.

Nor is it, as it was represented, necessarily a *binding* adjudication, or precedent, because it is the *last*. It has weight, upon that account, and so it has *at law*; upon this idea, that judges in general pay a deference to the supposed accuracy of their predecessors in a solemn decision; but the deference is by no means implicit, or blind, unless where the decision is of remote antiquity, and the custom of the law in adopt-

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ing it ever since, has given to it another weight, though at such a distance of time they are not able to account for it, or even should have no scruple to rescind it if it had been recent. In all other cases, it is not the comparative *date* of the judgment, that affirms it, but the *law* contained in it, in the opinion of the court who are ultimately to rule it. Of this I can give you a memorable instance, familiar to the lawyers, and of no other consequence at present except as a point of legal curiosity.

Before the act of parliament which made legatees and creditors admissible witnesses to a devise of land, it was held by *Lord Chief Justice Lee*, and the court of King's-bench, that such witnesses were absolutely incompetent.

After the act of parliament, a case arose in the same court of King's-bench upon a devise before the act, and upon the very same point which has been ruled *against* the competency of the witness.—*Lord Mansfield*, and his brethren, determined that he was competent.

After this *reversing decision*, *Lord Camden*, and the court of Common-pleas, replaced the earlier judgment of the two by a judgment of their own, conforming to it.

I am

I am aware, that by this mode of reasoning, I may seem to depreciate the *reversing order* of 1685; but I have said nothing in favor of it, that militates against these principles. For *cæteris paribus*, the later decision is the best;—but I have gone further; and proved, as I hope, the *good law* contained in it, as well as the countenance it has received from later *judgments*, or *judicial acts*. I am proceeding to shew, that no *judgment*, or *judicial act*, or even *extra-judicial opinion* of the same court has ever shaken it; but that in *Lord Oxford's* case it was recognized, and affirmed:—not in a *judicial form*, I admit, or with a mathematical certainty of the fact; but with a natural, and plain impression of it, which every man's common sense, in my opinion, will entertain, when the circumstances are laid before him.

As to the *order of* 1701, I can by no means think it a circumstance of light, or trivial weight, as others have done, with whom I have in general agreed; and I am ready even to admit, that I should lay infinite stress upon it, if it stood *alone*; as an authority (though I would not call it a *judicial* one) *against* the point which I am endeavouring to support.

It must, in general, be conceded, that either the lords did not approve the two last precedents of 1685 and 1690;—or that for some *political* reason, with *two* strings to their bow, in the *Duke of Leeds's* favor, they chose to use *one* of them *alone*, which they found essential to the case of the other peers; and which, being a *new* claim in the terms of it, (though within a general equity of their judicial powers,) they were anxious to announce in multiplied instances of it, though in *one* of them it was not wanted for the particular case.—A *third* alternative is, that having plain ground before them, which united *all* the cases under *one* principle, “*the want of prosecution,*” they *overlooked* (I mean literally) the distinction as to the *Duke of Leeds*.

Let us examine these alternatives; but let it be admitted first, in return for my concessions, that if this order can at all wound the authority of those in 1685, and 1690, or of the *acts* that accompanied them, it must wound them by an *intention* to depreciate their credit, either apparent, or naturally inferred.

I would therefore ask, in this view, if it is conceivable that, in 1701, the peers *meant*, by the reason which they assigned for liberating the *Duke of Leeds*, to replace by a side-wind the  
 11 order



order of 1678, *not before them*, and, at one stroke, to upset the judicial inference drawn in 1690, from a search of precedents, at least elaborate, and apparently impartial \*?—Or, is not *either* of the two other alternatives more probable?

It would have been a high disrespect for the order of 1690, if the peers had *said* in the order of 1701, “being of opinion, that he has no claim to be discharged, upon account of the intervening dissolution.”—Would not many of the peers who had issued that order of 1690, have started up, and have claimed an audience in support of *their judgment*? And could it have been *decently* reversed, without a *debate* upon it?

\* I was a little surprised at the condescension of a most ingenuous, and liberal mind, in stooping to the remark, “That *Scroggs’s case* is omitted (evidently by accident) in the list of precedents reported 1690, though conforming to that of *Danby*, and the *catholic peers*.”—Nothing was done upon it, and therefore it might slip from the attention of that committee; but more especially, because it was before the reversing order of 1685, and posterior to 1678: So that it was only the effect of the order 1678 *unreversed*, and was not in the view of the remark which the committee made, by which they pointed at precedents, either earlier than 1678, or later than 1685; meaning to convey the same idea which is more accurately expressed by the dissenting lords in 1717.

Between

Between these two periods of 1690 and 1701, there was *no* political distinction, as there *was* between 1685 and 1678. The peers in 1701, acted with as much patriotism as both houses of parliament could have displayed in 1690; and, as their *main* conduct had so much honor in it, one should less impute this kind of *trick* to *them*, for no conceivable purpose.

You observe, that it was not the point made by the *Duke of Leeds* :—But even let it be assumed that it *was* ;—could any thing be more natural, than for the peers to *chuse*, that without prejudice to his other ground, though *alleged*, he should be released upon *this*, when they were solicitous for the establishment of it, with a view to their own general powers ?

It is very obvious to me, that something of a similar kind was done as to the two catholic peers in 1690. The lords *could* have examined the effect of the general pardon upon that case, by comparing it with facts, which the authenticated evidence could have adduced, and without which, upon the *hypothetical* report of the judges, this act of general pardon became waste paper, as to those who claimed the benefit of it. But they *chose* to desert this obvious, and short inquiry, for the direct purpose (whether political,

political, or constitutional) to liberate the peers, upon the *single* ground (as they most clearly did) of the *terminated impeachment*. If they did this, in part, with a view to *Lord Carmarthen*, (who had the talent of being always execrated by the commons, under every title, and in every change of his politics,) I see no harm in it;—as the same reason which made *him* apprehensive that a single precedent, in such a period as that of 1685, might not avail him in such a new *era* of things and men, as in 1690, might induce the peers to examine dispassionately, and settle this point;—in order to redeem it, by *acting* upon it, if it was right in itself, or to renounce it, if it was wrong, by resorting to the other topic, of the pardon alone.

It may be asked, however, upon what ground it was, that in 1701, the law being thus clear, and settled, the *Duke of Leeds* deigned to rid himself of the impeachment against him which could not hurt him? I cannot answer for the *Duke of Leeds* in 1701; but it seems no violent supposition, to apprehend that he might think an *actual* discharge more convenient altogether than a *legal* one, and the dismissal of *his* impeachment a better security for him than an order of that court upon *other* impeachments, *liable* to be reversed, as *he* well knew, because  
he

he knew the order against *himself* in 1678 had been actually reversed in 1685.

But what is to be said of the whole proceeding in 1717?

Here again triumphant ridicule (and the *knot* is *worthy* of the *god*) has been taken for the *test of truth*, against the most obvious impressions of as plain a fact, as ever came under the discussion of unbiassed men.

I again ask of any individual, and let him have *your* talents, or let him have *none*, if he has but the useful character of a *sensible man*;—of *him* I would ask, or, with equal confidence, of the acutest logician alive, two questions:—Are you thoroughly possessed of the facts upon record, and of the historical ones, obviously applicable to *Lord Oxford's* case in 1717?—If you *are*, have you any *doubt* in your mind, though upon the evidence of analogy alone, that by the peers, assenting to that vote, or dissenting from it, “ *the end of an impeachment, as resulting from the end of a parliament,*” was taken for clear?

If you are not apprized of the facts, here they are:—Examine them fairly, and then determine for yourself.

Upon

Upon the 10th of July 1715, this Earl was first impeached at the bar of the lords.

The *tory-peers*, who were numerous, and were *his* brothers in affliction, moved immediately two plausible questions enough:—one for an adjournment only of two days, the other for a question to the judges—“ whether the charge “ contained, or did not contain, high treason.”

Both propositions were negatived by the *whigs* (for the term in those times was more than a *sound*), though, as to the second of them, it seems unexceptionable, and a very dignified caution against imprisonment upon grounds too hastily assumed upon the *ipse dixit* of the accuser.

Upon the same 11th of July, this Earl was committed, in the first instance, to the gentle custody of the black rod.

But upon the 12th, an order of the peers, and more special than customary, sent him to the tower. The recital of it was—that he was impeached for high treason, and that *particular acts of high treason* were *specified* by the impeachment.

Upon the 7th of September, his answer was delivered.—Upon the 19th of that month, a replication was put in by the commons; and the lords, upon the 21st, gave notice to the commons, that his Majesty would give the orders for scaffolding, &c. in *Westminster-hall*. I mention these dates and particulars (little in themselves) to mark the zeal of his adversaries, who were in full power, against him. Of this I shall make use hereafter.

Parliament was then adjourned to October the 6th; upon which day the king announces the rebellion in *Scotland*.

Then a fortnight's adjournment carried both houses to the 20th; from whence, through several distinct intervals of new adjournments, they arrived in the end up to the 9th of January 1715-16; when the king made another speech alluding to the rebellion.

In their answer to that speech, the commons marked “the mal-administration of *Lord Oxford*, “as one great source of the rebellion;” this peer then lying under the weight of their impeachment.—In that which intervened, and was more accelerated against the rebel peers, a hint was given, that *Lord Oxford* encouraged *them*.—

Well

Well might *James the Second* exclaim, “ *all commons are the same.*”—No man admires their public spirit, and their political energy in this government of ours, more than myself;—no man exults more in the general advantage of their power to accuse a minister, in, or out of place;—I think even the terror of it is of use, and the *just* exercise of it, one of the most eligible advantages in the government. But when I look at what I may call *the tyranny of their virtue*, in some of those *judicial proceedings* which they have *in fact* instituted, I am such a *tory*, that I cannot repress the horror which I feel in reflecting upon it:—Here, “*Tros, Tyriusve,*” is nothing to the fatal precedent of such intemperate conduct. If popular zeal is *ever* to inflame a court of judicature, I can scarce imagine two better victims of it than either of these Earls; but indeed, Sir, I am persuaded that your goodness of heart will make you revolt at these inhuman prejudications of any culprit upon earth; and I must here do *you* the justice, to applaud your abstinence from any such modes of irritating the popular mind against *Mr. Hastings*. He is the worst enemy to impeachments, who can thus calumniate the *noble end* which they have in view, by the *mode* of professing to attain, or follow it.



We left the *Earl of Oxford* in 1715-16, and early in that year we find him again, upon the 22d of May 1717, a suppliant at the bar of his peers, in a very modest petition, representing, “ that he had been imprisoned ever since the “ 12th of July 1715 ; ”—stating, “ that one “ *prorogation* had intervened ; ”—and requesting, not a discharge, nor even bail, but in general terms, “ that his imprisonment might *not* “ *be indefinite.*”

An immediate order is made, “ that all the “ lords this day present be a committee, to “ search, and report such precedents, as may “ the better enable the house to judge, what “ may be proper to be done on occasion of the “ said petition, and the case of the said *earl*, as “ it now stands before this house.—That the “ *earl*’s petition be referred to the said committee, who are, in the first place, to search “ for, and report such precedents, as relate to “ the continuance of impeachments *from session* “ *to session.*”—Here one should have thought they would have stopped, for this inquiry would have given the sole ground which they took for the vote they issued ;—but no—these words are added — “ *or from parliament to parliament.*”

This

This clause not being *directly* to the point, *must* have been added for the sake of *analogy alone*.

That analogy, as we know, *could* not, under all the circumstances, if the *whigs* had common sense, have been pressed by *them*; because the authorities upon *dissolution* were against them: But for the *tories* to set it up, was natural; because, if *they* could prevail in it, all the force of the orders in 1685, and 1690, would cover *them*, and their favorite.

It was the obvious policy of the *whigs*, no judicial precedent having reached the case of *prorogation*, either *in terminis*, or (as *they* perhaps concluded) upon sound analogies, to *distinguish* the nature of *this* interval, from that of a *dissolution*. It was the obvious policy of the *tories*, to unite, and confound them. *Lord Trevor*, a tory, and friend of *Lord Oxford*, was at the head of this committee.

Upon the 25th of May 1717, they reported.

They cite in this report many cases respecting *dissolution*; indeed all of them that were to be found; and I need not again state the effect of them.

Respecting

Respecting *prorogation*, they cite very few, not, as I recollect, more than two;—that of *Lord Viscount Mordant*, 1666; and of *Sir William Penn*, 1668;—which amount only to this conclusion, “that after *prorogation*, the commons did not *in fact* proceed:”—Which, however, was not a circumstance unfavourable to *Lord Oxford*, though it could not be of much use to him.

But they seem to lay stress upon the judgments in 1685, and 1690; they do not overlook the *Duke of Leeds*, in 1701; and they call into the list (for no very intelligible purpose) the *indictments* of several peers, unaccompanied with any account of the effect produced upon them by *either* of the intervals, and, I believe, unaccompanied by the *fact*.

The question is then put, with strict propriety,—“whether *prorogation* terminates impeachment?”

It is resolved in the negative; and the dissenting lords, or some of them, *protest*.

1. “Because *there seems to be no distinction* between a *prorogation* and a dissolution of parliament, which, in constant practice, have had the same effect as to determination of judicial  
“ and

“ and legislative proceedings; and, *consequently*  
 “ *this* vote may tend to weaken the resolution of  
 “ May 2, 1685, which was founded upon the law  
 “ and practice of parliament, without one prece-  
 “ dent to the contrary, except in the cases which  
 “ happened after the order made the 19th of  
 “ March 1678, which was reversed and annulled  
 “ in 1685; and, in pursuance thereof, the Earl of  
 “ Salisbury was bailed in 1690.”

Whatever artifice, or fallacy of argument may  
 be contained in these records of dissent (and  
 I see *traits* of both in this protest), they are of  
 inestimable value in one view, as *keys to the point*  
*of the debate.*

There was no pretence for determining this  
 impeachment, unless *prorogation* fell within a  
 perfect, or, at least, a liberal analogy of *dissolution*.

The enquiry therefore, as to the effect of  
*dissolution*, was intruded upon the house, (by the  
 medium of the committee,) on the part of *Lord*  
*Oxford*; the *whigs* not afraid of it, and there-  
 fore not resisting it.

That analogy, therefore, must have been  
 pressed in the debate; and the written dissent  
 is generally a reinforcement of the topics that

had been used by the peers who opposed the vote with a little more *fling*, as the result, in part, of irritation at their defeat.—What said the *whigs* in this debate, by way of answer to the *tories* in their attempted analogy?—Either *nothing*, which, in a debate sustained by ingenious men, is not probable,—or that the two cases were different,—or that being the same, they were both of them, in parliamentary law, cases of *continuance*—not of *abatement*.

If they had made the last assertion, what could be more weak than for the *tories* to have protested as they did?—And *Lord Nottingham* (one of those dissenting peers) was not a weak man:—Would they not, instead of touching with a general commendation upon the orders of 1685, and 1690, have reasoned at length upon them, and vindicated their propriety?—Would they not have answered in their *protest*, as they must also have done in the *debate*, those grounds upon which these orders had been depreciated by their adversaries?

On the other hand, if the *whigs* denied the analogy, they must either have denied, or admitted the law that was affirmed by the *tories* respecting *dissolution* to be correct. If they denied the law to be good, this protest would be

absurd ;—if they admitted the law, it would be natural, and properly expressed.

The *effect* of their protest is to say :—“ *There is no doubt as to dissolution ; and prorogation is the same thing with a reference to this point of determining an impeachment. We are afraid of a new precedent ; which professing in terms only to reach the interval of prorogation, may, in its consequences, derogate from the authority of that order in 1685, respecting dissolution, upon which you have, yourselves, judicially acted in 1690.*”

By the way, it is material to observe, how directly the *act* of the peers in discharging *Lord Salisbury*, is referred by these protesting lords to the judgment of 1685. That reference they must have asserted in the debate ; and it must have been admitted, or they would have made some efforts to establish it, instead of barely affirming it upon the written argument. I therefore call every peer in this debate, as a witness to the *fact*, that in *Lord Salisbury's case* the house of peers *did not* act upon the *pardon*,—*did* act upon the order of 1685.

What a mockery upon good sense, good manners, and parliamentary decorum (in a house that claims the monopoly of it), if this protest had been written after a debate, in which the

order of 1685, and the effect of it in 1690, had been questioned!

What could have been the use of such a fallacy?—The *whigs*, triumphant in reasoning as well as in power, would have answered thus:—  
 “ *tend to weaken* the order of 1685! How  
 “ can it *weaken* that which has no strength? If  
 “ it has, we *mean* to weaken it, we mean to de-  
 “ stroy it; *we told you so in the debate*. You  
 “ state as an admitted point, that a dissolution  
 “ ends an impeachment, as if conceded by us.  
 “ You cannot pretend ignorance that we made  
 “ you no such concession.”

It is an anecdote, but of some importance, that *Lord Nottingham* was present (and it may be supposed not inactive) in the debates of 1685, and of 1690. It would have therefore been peculiarly disgraceful in that peer, to have set up the validity of this order in 1685, by a general averment, if he had not felt his ground strong under him, upon the subsequent confirmation given to it in 1690; and upon the agreed opinion of that same court in this very debate of 1717.



I must here impress upon the reader what appears to me, a just, and liberal distinction. Knowing of how little use would be the doctrine of retaining the impeachment for the purpose of a new trial upon it, after the unexampled prolixity of this, I have not expatiated upon the difference, wide as it is in general reasoning, between that species of continuance, and what is now demanded by the commons, namely, the right of going on with an impeachment *upon which evidence has been heard*.—But in point of *usage*, I take the discrimination to be this:—That if all the various precedents of parliament itself, applicable to the point of continuing, or ending an impeachment, are laid upon the shelf; in other words, if the decision is to be governed by analogies to *other* courts of criminal justice, and the leading principles of it, in our law, the record being still in the house of peers, that court would, or might act upon it, from the point of the record itself; calling upon the culprit again to answer.—*The continuation of the evidence* would not be endured.

But if *precedents* in parliament itself are to regulate, and controul this analogy, a dissolution

of parliament, in that view, leaves no record, upon which the court can act *at all*, or for *any purpose* in the new parliament.

I have the honor to be,

S I R,

Yours, &c.

## LETTER THE ELEVENTH.

Aliud est *maledicere*, aliud *accusare*. Accusatio crimen desiderat, rem ut definiat, hominem ut notet, argumento probet, teste confirmet. Maledictio nihil habet propositi, præter contumeliam; quæ, si petulantiùs jactatur, *convicium*, si facetiùs, *urbanitas* dicitur.

CICERO.

S I R,

I HASTEN to release you (or, I should rather say the reader, who may have thought me worth his attention) from the political, historical, and legal evidence, which an interesting pursuit, at least in *my* view of it, has tempted me to lay before you. Perhaps, in what I have written, may appear that very zeal of a partisan, which I have deprecated, not only as an insult upon the public, but as being of serious prejudice to my own argument: Yet, I can with truth affirm, that I have not been conscious of this polemical spirit, for a single moment. If the indiscretion of a nature, which does not pique itself upon the opposite virtue, or of a pen, which never had the courage before, to encounter general criticism upon a field of such

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extent,

extent, has betrayed me into words that are too strong, I recall them, and wish the reader may in candour put them to the account of that "*incuria*," which even *you*, Sir, (though in *you*, genius always accompanies it) cannot universally escape.

It becomes me, who am one of the least of a minority ridiculous in point of numbers, but in many parts of it made respectable by the weight of \* legal abilities, and personal character, to be diffident in my own thoughts, or in those which I may have borrowed from others who formed a part of that minority, against the political, and favourite opinion of the day,—at least in parliament.

I am comforted however by this reflection—that every liberal supporter of the "*victrix causa*," has admitted, in express words, the *importance* of the discussion; and has proved, that in his own mind a *doubt* hangs over it, by those vehement efforts which his eloquence, or wit, or talent of reasoning, or weight of party-con-

\* I remember a minority of *five* in the house of lords : two of them were *Lord Northampton*, and *Lord Camden*. By accident *Lord Mansfield* was not in the house, or would have made *six*, having given his opinion against the vote that prevailed.

nections,

nections, or popularity of character, has called forth into the debate.

Nor is it in one view unaccompanied with some flattery to the lawyers in this minority, that personal ridicule upon one of them, and a general banter upon their whole profession, as a part of the senate, has been thought a rhetorical, or political expedient, of no despicable value, by such powerful reasoners as *Mr. Burke* and *Mr. Fox*.

But, first, I am to deprecate, as a constitutional member of parliament, all distinction of rich and poor, of high or subordinate rank, of commerce or of land, of noble or plebeian origin, of military or naval profession, of politicians or lawyers, of this or that ground for independence, for ambition, for personal views, or party engagements;—in those, who, such as they are, constitute the representatives of the people: They are all of them treated by the constitution (without *Marc-Antony's* ridicule,) as “*honourable men*.” These, are principles which I have learnt ever since I begun to reflect upon the nature of a parliament, in the popular scale of it; and they are principles, which I have learnt in part from your captivating eloquence.

Let

Let me ask in the next place, what is the offence of these lawyers, which has drawn from you such a contemptuous *anathema* against their whole profession (except those who voted, and spoke upon *your* side); as if in future, the house of commons could place no confidence in them? It is, that upon a subject affecting deeply the essential rights of the constitution, and those of personal freedom in particular, they could not surrender their faith to the minister of the day, to his, or your eloquence, to the weight of your party, and the ministerial one united; or to a third set of their opponents, the culprit's admirers, and friends; but have delivered their sentiments like men of honour, without violence, but without fear.

Shall it be *forgot*, that most of them see in the minister whom they opposed in this debate, an object of their general approbation, and political attachment? or, that on the other hand, a very popular advocate, whose want of political zeal for *your* side of the house has never been questioned, came forward, and threw the gauntlet, with his accustomed spirit, in support of principles which he thought inalienable blessings of the constitution?—Let it then be recorded, as at least *one* merit of these  
dissentient

diffident lawyers, that party of no kind has at all swayed their conduct. As to their personal character for integrity, (of all virtues in a senator the best,) even the “*urbanitas*” described in the motto, which distinguished *your* elegant, though keen satire upon them, from the “*convicium*” that followed it, will hang like the shaft in *Virgil*,

“*summo clypei necquicquam umbone.*”

But, “*they look to the house of lords.*” Where, sir, must that *Revolution* have been found, which you so correctly understand, and with such dignity have rescued from insidious friends; if, before the golden period arrived, *Somers* (a name which no other, of any age, or of any scene, has yet surpassed, in liberality of sentiments, in the delicacy of political discernment, or in the most elevated spirit of public virtue) had been called, with popular effect, by such eloquence, and wit, as yours, “a bird of passage,” “not at home in the house of commons,” but, “perching there in his way to the lords,” with “his eye fixed upon those flowers and fruits that were glowing, and ripening for him there,—in that resting-place of delight?” If in those days his profession, which had always considerable weight in the house of commons, had been depreciated, where should we have traced the “*just*” and the

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“*tenacious*”



“ *tenacious of his purpose,*” in *Holt’s* character? or the experience, and calm wisdom of *Maynard*? If in earlier times the same ridicule had been fashionable, we should have lost the patriot firmness of *Selden*, accompanied with a mass of learning that in points of the deepest consequence to the liberty of the subject, weighed his adversaries down; the liberal, expanded, and luminous mind of *Lord Hale*; I may add, with all his blemishes, the *Earl of Clarendon*? Were these, men of cramped ideas, or of that gross incapacity for constitutional knowledge, and political spirit, which you ascribe to the inherent character, and radical infirmities of our profession? May I not ask too, if you have discovered in the historian’s page, that lawyers have been even *accused* of the “*esprit du corps*, in “parliament;” or of any views to power and rank, that were not rather challenged, than solicited by the weight of their character?

I shall take up one more topic, which illustrates, by a recent example, the public spirit, and the political independence of *lawyers, in the house of commons*.

Some of those who form a part of the minority upon your victorious 23d of December 1790, gave proofs of an attachment which no interested motive could shake, either to their *sovereign*,  
(whom

{whom *you*, Sir—but I check myself—) or to that *minister*, whom a certain awful event was threatening to reduce into the common ranks of life. The chances were then a million, perhaps, to the minutest value in the opposite scale, that a *novus rerum ordo*, a new *reign*, in effect, would set a mark upon *their* opinions, to the ruin of their political hopes.

On the other hand, very *sagacious politicians*, who were *not lawyers*, embraced a different line of conduct, and *begun* to discover merits upon *your side* of the house when it was going to be the *other side of it*, which till that critical, that illuminating hour, had eluded their discernment.

Posterity will determine (if it should be interested by such enquiries at all) whether here *the politician who was no lawyer*, or *the lawyer who was no politician*, acted with most honor to the public, and best understood the constitution. But he, whose new opinion led him to emolument, and who became a “*whig*,” just at the time, of all others, in which men of that *name* (for it is no more, “*vox, et præterea nihil*”) were to fill offices of profit, must own to me, that by accident, *his* public virtue appeared in a more “*questionable shape*,” than a certain obstinacy of

opinion, which paid its court rather to a self-approving conscience, than to power and “ *the rising sun.*”

Having, however, observed, that before the impeachment of *Mr. Hastings*, you had not formed this contemptuous opinion of the lawyers upon other topics equally important, in which they took a part, I must really hope, for their sake, that your late ridicule of them arose from a dislike which you seem to have ingenuously conceived against those land-marks of criminal justice, which *their* habits and reflections have taught them to revere;—from a wish to reach this *Indian* culprit with more facility than mere law can admit, with a more elevated hand, and upon more unfettered principles of reason. I have observed, that even the rules, or *principles* (for so *we* call them) of legal evidence are not admitted into *your* creed, as any check upon those who accuse by impeachment. In vain you have been told, that such rules as these had nothing technical in them, but were inferences of sound reason,—of the most liberal justice,—of that mercy which the law of England loves, and of general convenience in guarding the “ *custodes ipsos,*” when crimes are before them. But we must unlearn in *your* academy these *quaint* precepts, and admit  
in

in a court of parliament, that even rules of testimony, like every thing else, if *the legal organs of the people* accuse, are to shift as well as they can, according to the exigency of the day, or of the minute; and so model themselves as to attain the *political* object, or vindicate the national honor, in convicting, and punishing a delinquent of state.

*Montesquieu*, I remember, in his very ingenious chapter upon our constitution, has given to the judges upon impeachment a power which the constitution has *not* given to them; but it is a power of mercy, in tempering the rigor of the law which has been violated. The idea of enabling the accuser to dispense with rules of law, *against* the culprit, in order to facilitate his conviction, had not been imparted by his English friends to the docility of that enlightened *historian*, nor had the wisdom of it struck *him* as a *philosophical reasoner* upon the policy of government.

As to *Mr. Hastings*, whom you have represented the *lawyers* to befriend, I take pride in declaring, again and again, my uniform opinion, that you have most ably selected him as the object of your impeachment; and that no adequate justice could ever have *tried* him for the offence which you have charged against him, (upon sufficient *ex-parte* evidence,) if this ultimate resource,  
and

and solemn expedient of the national honor had been overlooked, or entrusted into any hand but your own.

The power of impeachment, if dignified and chaste in the use of it, gives to our view the most elevated scene that human justice can admit:—*not* because it has rules of its own, at a moment's warning, for any of its purposes, adverse to the culprit;—*not* because it may reflect upon every judgment of the court, which is of use to *him*, and may institute even a personal conflict with judges who form a part of that court\* ;—

*not*

\* *Lord Bacon* says ;—“ Let not the *counsel* at the bar chop with the judge, nor wind himself into the handling of the cause anew, after he hath declared the sentence.”

It is a distinction of the managers for an impeachment, that no counsel at the bar appear for *them*. The commons execute no part of their accusing function by attornies ; they demand imprisonment, or bail, or trial, or judgment, *in their own persons* ; they are, in the eye of the constitution at least, *their own counsel* ; and this, which has been lamented as a disadvantage, is only *too* beneficial to them, unless temperately managed, with a discipline of self-government, which has been recommended even to an epic poet's discretion ;—

—“ *parentis viribus, atque*

“ *Extenuantis eas, consulto !*”—

It may be, in the first place, an apology at once for a deportment which no *counsel* would attempt ; because *he* would know, that it would give immediate offence to the court ; and for propositions, which no *lawyer* who valued his character, would risk in a court of justice.

In

*not* because it may endeavor to intimidate the advocates for the accused by the political rank of the accusers;—*not* because it may harraßs the party with superfluous delay, and expence;—*not* because it may ramble into accusations, which are not alledged, and cannot, therefore, be authenticated: But upon very different ideas of an *elevated* character.—*Because* it rescues a national concern from courts that would be unequal to it, and scorns to ask a jury of *London*

In the next place, it enables them to impress, by the ascendant of their eloquence, topics of odium against the culprit, which admit of no proof. They can reason thus (and it is an argument from their *weakness*, to their *strength*):—“ We are *no lawyers*;—if you bind us by the rule  
“ of *inferior* courts, a rule that we cannot understand, you  
“ tell us at once, that we are no longer to accuse: Let us  
“ proceed, my lords, by rules of our own, rules that we *do*  
“ understand; such as the rule of policy—of state convenience—natural justice, interpreted by ourselves, and  
“ without a single fetter upon it—principles of sentiment,  
“ and feelings of public spirit.” In other words (but in their sleeve) they can tell them—“ Let us tempt you to  
“ convict this man, by eloquence, rank, and power !”——

“ *Jane pater,*” *clarè,—clarè cum dixit,* “ *Apolio,*”  
*Labra movet, metuens audiri,—“ da mihi, pulchrè*  
*“ Fallere.”*

In the last place, it elevates the advocate for the accuser, who is indeed the accuser himself, into a figure of political importance, with whose pride of station, the only attainable advocate for the culprit is not upon even ground.

OR

or *Middlesex*, if treaties have been violated, nations exterminated, or princes oppressed, and enslaved\*;—*because* the accuser by impeachment is the people, in the most awful shape of their power; and if tribunals were to judge, who were also taken from that class, they would be (as *Montesquieu*, writing upon the very point, well expresses it, by a term that admits of no translation) *entraînés* by the weight of so powerful an accuser;—*because* (to follow that writer) “ it is  
 “ necessary, in order to sustain at once the dignity  
 “ of the people, and the security of the individual,  
 “ to make the popular branch of the legislature  
 “ accuse before the other branch of it, consist-  
 “ ing of the peers, who have neither the *passions*  
 “ nor the *interest* of the accuser;”—*because* it holds a lesson to ministers, great men of all descriptions, and even the sovereign himself, that a feeling and a national spirit, by its “ *ex-*  
 “ *press image*,” the house of commons, can reach any delinquent of state, and guard the dignified character of Great-Britain against the dishonour of public wrongs;—*because* it marks to the pub-

\* A more exquisite piece of satire was never heard than your's upon *Stratton's* fine, in the king's-bench:—“ *The legal price of a rebellion is 1000 l.*” But there was deep sense in this wit; for the courts of law have not arms long enough to reach the extent of such crimes, or political energy enough to punish them as they *should* be punished.



lic, that although national feelings and political objects elevate this proceeding in *dignity* and *use* above a common indictment, the accuser glories in submitting to that, which is paramount even of *his* character\*, to a law that protects the “*giant*” as well as “*the poor sharded beetle*,” the oppressor, and the oppressed, against the worst of all tyrannies, *judicial* despotism—to a law of *rules*, and *principles*, the accumulated wisdom of ages, and calculated for no shifting exigencies of the day, but for universal judgment:—*because* he who accuses by impeachment is, in a better view of that phrase, *the people*,—feels as *they* feel, and respects, without shame, as *they* also respect, those presumptions for the accused, which every man’s heart approves; those ramparts of legal evidence, and of equal justice, which every man is born to support:—*because* the impeaching senator does not find his understanding too proud, or his enthusiasm too vehement, for those rules of *competency*, and *credit*, which *govern* the highest courts of law in *their* systems of *proof*; and are neither technical, nor obscure, but as liberal as they are clear, and as

\* The answer of the judges to *Henry the VIIIth* deserves to be writ in letters of gold:—“An *inferior* court could not, “in *law*, or in *justice*, do it; and we are of opinion, that “the *higher* the court is, the *more just* they ought to be.”

deep in their policy as they are smooth upon the surface.

But if to the uncommon advantages of this accuser, can be added the indefinite continuance of his impeachment;—if the death of the accuser in his popular office (which alone enabled *him* to accuse) is to have no effect in terminating the risque of the culprit, but may expose him to a *new* accuser, more bitter, perhaps, and less informed, or liberal, than the first;—if the king's power of dissolution may baffle the riper judgment of the commons when it inclines them to abandon their suit,—if it may enable him, after accusing by influence through a corrupt house of commons, to harass by delay, to oppress by imprisonment, and convict by intrigue, a popular culprit, impeachments will become unpopular, and great offenders will triumph in their impunity. It is remarkable, that with all the advantages of this proceeding in theory, few impeachments, ever since the line of *Tudor* failed, have been either just in themselves, or well conducted. *Lord Bacon*, and *Lord Middlesex* were proper objects of impeachment, and fitly punished; but the mode of proceeding against them was abrupt, and irregular. The impeachment of the rebel Scotch peers was most awfully, and ably conducted in both of the two  
last

last reigns. The impeachment of *Lord Macclesfield*, though it sprung from political motives, and was perhaps too severe, was useful in the example, and very dignified in its conduct. The impeachment of *Sacheverell* was entirely political, violent, and injudicious; though it brought forward some of the ablest arguments against “*passive obedience*,” that were ever thrown away upon such despicable adversaries. One of those arguments, and which is of unexampled ability in the annals of English, and perhaps of Roman eloquence, brilliant as they are, is the work of a *lawyer*;—of that ill-fated, but accomplished peer whom I have last mentioned, and who owed the seals to the exertion which he then made.

The reverse of the picture it gives me pain to contemplate. The impeachment of *Lord Danby* was in itself perfectly just, and, if guarded in its description, pure in its motives, or even decent in its conduct, would have done the house of commons or the peers no dishonour;—but, as it is, no measure ever disgraced either of those two assemblies more. Nothing but oblivion, or contempt, saves the earlier impeachment of *Lord Clarendon*, from that brand of odium upon it, which else would be it's fate. The impeach-

ment of *Lord Stafford* was\* madness in cold blood: And the memory of *Lord Nottingham*, great as he was in his own court, will be for ever polluted by his address to that peer, when he apprised him of his fate. *Burnet* calls it the most eloquent speech that he, the chancellor, ever made; but censures the very solemn and *judicial* declaration, that, “a design to murder “the king, &c. had been on foot.”—Of the *eloquence*, I see no proof;—but of the *humanity*, and *good sense*, let the reader judge by the fol-

\* Impeachment has been compared most absurdly to the suit of a party in what is called the *appeal*, and which demands punishment for the *injury* suffered, more than for the *offence* to the public. It was first pecuniary, and was changed into capital, but still partakes the idea of civil, and pecuniary atonement; inasmuch as the death of a convicted *appellee*, may be expiated by a fine,—that is, the *appellant* may release the *appeal* for a sum paid as the condition of that release.—But the ancient usage was, that all the relations of the party murdered, had the *comfort* or “*privilege*” of dragging the *appellee* to his place of execution. This kind of *savage recompence*, is, after all, in a more enlightened age, encouraged as a part of our law; for the *appeal* at this day is, in its legal principle, nothing else; and it seemed as if the managers against the *Viscount Stafford* felt that principle of the analogy; with only one shade of difference, that in shedding *his* blood they resented the injury of *others*, or punished his religion by the murder of a harmless, and weak individual, because they could not punish it in the *Duke of York*, by excluding him from the English throne.—These, I call, again, the *tyrannies of public virtue*.

lowing extracts; which, if they were not fol-  
lies that ended in shedding innocent blood,  
would stimulate one's ridicule more than one's  
horror.

“ Who would have thought that a person of  
“ your quality, &c. should have entered into so  
“ infernal a conspiracy as to contrive the murder  
“ of the king, the ruin of the state, the subver-  
“ sion of religion, and, as much as in you lay,  
“ the destruction of ALL the BODIES and SOULS  
“ in THREE CHRISTIAN NATIONS ?

. . . . “ That there hath been a general, and a  
“ desperate conspiracy of the papists, and that *the*  
“ *death of the king* hath been *all along* one *chief*  
“ *part* of the conspirators' design, is now *appa-*  
“ *rent beyond all probability of doubt.*”

Mark his proofs ! “ What was the meaning  
“ of all those treatises which were published  
“ about two years since against the oath of  
“ allegiance, at a time when no man ever dreamt  
“ of such a controversy ?—What was the mean-  
“ ing of *Father Conyers's* sermon upon the same  
“ subject ; but only, there was a demonstration  
“ of zeal, as they called it, intended against the  
“ person of the king, which the scruples arising  
“ from that oath did somewhat hinder ?

“ To

“ To what purpose were all the corresponden-  
 “ cies with foreign nations?—The collection of  
 “ money among the fathers, abroad, and home?  
 “ What was the meaning of their governing  
 “ themselves here by such advices as came fre-  
 “ quently from *Paris* or *St. Omer’s*? And how  
 “ shall we expound that letter which came from  
 “ *Ireland*, to assure the fathers here, that all  
 “ things were in readiness there too, as soon as  
 “ the blow should be given?

“ *Does any man now begin to doubt how*  
 “ *London came to be burnt*; or by what ways,  
 “ and means *poor Justice Godfrey fell*? And  
 “ is it not apparent by *these instances*, that such  
 “ is the frantic zeal of some bigoted papists,  
 “ that they resolve no means to advance the  
 “ catholic cause shall be left unattempted,  
 “ though it be *by fire and sword*?”

The impeachment of *Lord Somers*, &c. in  
 1701, and that of *Lord Oxford*, &c. in 1717,  
 came to nothing;—they were political measures  
 of party-intrigue.

A single word upon the *conduct of the impeach-*  
*ment* against *Mr. Hastings*.—I admire most  
 unequivocally, the eloquence employed in it, for  
 the noblest of all purposes. I think too, that  
 as

as long as our *commission*, if I may use that phrase, is unrecalled, we cannot blame the managers, with delicacy, or prudence. I disapproved the check which you received in the house of commons, upon the subject of *Nuhcomar*, and I did not vote for it. I *lament*, without blaming, *the time which has been occupied in this impeachment*, for one plain reason—*Mr. Hastings* is either innocent or guilty: If the former, his acquittal is bare *security*; it is not *honour*, as it *should* be; for it will be ascribed by the common observer, to the mere impulse of compassion upon his judges for the anticipated punishment which he has already undergone: If he is guilty, conviction, and punishment will be less exemplary; because, they will be counteracted, and weakened by the same compassion operating upon the good-nature of the public. I am, however, much pleased with your last proposal, to shorten the remainder of your articles:—It was humane to the culprit, just in its principle, correct in its form, and very judicious in the respect it marked for the public opinion.

I have the honour to be,

S I R,

Yours, &c.



## LETTER THE TWELFTH.

Nunc, quamobrem has partes didicerim, paucis dabo.

TERENCE.

SIR,

THERE is not one of the many astonishing talents, that nature, in her most partial mood, has given to *Mr. Fox*, which I have so often wished in vain to borrow of him, as the talent of abbreviating, with new force, the substance of an argument previously delivered by himself; but with so little hint of a regular method, and with such variety of detail, that you would little suspect the arrangement, by which the parts of it are divided, or united, as links of a chain.

In general, attempts at an epitome, either, according to *Horace's* comment upon them, "*strain at brevity, and become obscure*;" or they are tiresome repetitions of the *sense*, in passages of detail, if not of the *words*; or, without  
being

being short, omit the passages which most require to be impressed.

I shall hope to avoid those *defects*; though I despair to catch the faintest ray of that envied *power* which in *Mr. Fox* appears to me unexampled, and above all competition.

My first attempt has been, to refute *general principles* which I thought new to the constitution, dangerous to its freedom, and ready apologies, in worse times, for the law of tyrants in the house of liberty;—for a *discretion*, which is an abuse of the term, because it is blind and unlimited;—for discord between the *accuser* and the *judge*;—for endless confusion between *rules* and *principles*, between *expediency* and *right*, between *legal* and *constitutional*;—for converting public accusers, and an open trial, into a scene of insult, and of torture, which the purest virtue could not escape.

Combating these principles, with an impartial zeal for truth, but with a diffident spirit, I have separated the *reasons* from the *eloquence* that clothed them in a robe of magic, which not only adorned, but consecrated them. Ingenuously wishing to deprive the *argument* of no weight that was due to it, I have caught, perhaps, the mere

*points* of it, their *substance*, *arrangement*, and *connection*, though in a very few lines.

Protesting against the competency of an inference to what is *just*, from what is *expedient*, (though we are told that *convenience* is *justi prope mater*,) I have yet answered this popular challenge, putting several cases, (none of them I hope, extravagant,) in which *the continuance of trial by impeachment, after a dissolution of parliament*, would strike with infinite prejudice at the liberty of the subject, and with a death's-blow at the accuser's discretion, which is an essential part of his right, and of his trust;—would enable the king to guard his minister with less indecorum, and would give him a more ample field of power, in the persecution of a meritorious culprit.

I have then grappled, as well as I could, with all the other topics, in support of this vote, arising from the nature of parliament, and from the nature of impeachments. I have met, and resisted, the *new* doctrine of a parliament *asleep*, and *wakened* by the king;—the *inherent* right of a peer (equally *new*) to demand, *without ceremony*, his judicial character, as being inseparable from his *robe*, in the house of peers;—the *legal organ* of the *people*, in their function (or “*privi-  
“ lege*”)

“ *lege*”) of accuser, which is alive, it seems, and has a pulse (like swallows in the winter) between one parliament and the next, be the interval ever so long; the comparison of this *legal organ* to an *attorney-general*;—and the right of impeachment, considered as *privilege*. Here too I have sustained, as I hope (not against *ridicule*, but against any just imputation), a doctrine, which I avow to be a rooted part of my political faith and creed; “ that by the constitution of this government, the commons of England, in parliament assembled, have an independent mind, instead of being *agents*, in any sense of the term, either to their local elector, to the constituent at large, to the people out of doors, or to another house of commons; that it is the duty of their seat, and representative character, to act for the general and real interest of that popular claim upon the government, which they personate; but with a sense of honor purely *their own*; with a discretion of *their own*; with a political sentiment of men, or measures, equally *unfettered*; and with such ideas of constitutional freedom, as *their own* researches, habits, or feelings, may have prompted them, *bonâ fide*, to entertain, in direct opposition (if their conscience makes it necessary) to the wishes, and

“ positive injunction of the electors, or to the  
 “ *testamentary* admonition of *departed* repre-  
 “ sentatives.”

And I hold this doctrine to be that of as true a *whig*, as any in the house of *Cavendish*, *Russell*, or *Bentick*. I have called upon *Mr. Burke* for his countenance to this faith, by the manliest independence of conduct that his public life has ever marked; when, addressing his electors, he communicated, in better language, the same ideas which, in mine, exposed me to ingenious, but ill-founded ridicule, and, most unfortunately for me, in the most eloquent speech that has been heard.

I have combated the misapprehension (as I took the liberty of supposing it) which gave to the *commons of England*, or of the *realm*, a controul over the *commons in parliament*, as public accusers, because every impeachment is in the *name* of them *both*;—an illustration, as I conceived, of my own principle; inasmuch as all the authority which is imparted by the *name* of those *prouder commons*, who are emphatically described, “ *of the realm*,” is given to their *subalterns*, the *commons of Great Britain in parliament assembled*, with an absolute power to make use of that *name*, as *their own*. You, Sir, using  
 the

the "*ardentia verba*" that impress your sentiments with such force upon us, have told us, that we, the commons, have in ourselves, by something livelier than *representation*,—by "*express image*," the "*feelings of the nation*."—That we have, by the constitution, a *general* credit for those feelings, I admit; but that a sympathy of those feelings animates *all* our measures, or opinions, and principles of government, is not even our *theoretical* boast:—It happens, for example, that your prosecution of *Mr. Hastings*, in which the sensitive delicacy of honor, that should be *national*, as well as *personal*, was deeply at stake, found the public at large completely indifferent; I was generally answered, "*we don't care about him*:"—The *distance of the scene* was, in part, the occasion of that indifference; but another, and more powerful cause of it was, that pretence for idleness which most of us too readily embrace; this, called itself "*the difficulty of the subject*;" which, to those who were not initiated, was "*chacs and old night*:"—What effect your brilliant perspicuity in developing Indian politics, complicated as they were, may have produced upon the *national feelings*, better instructed, it becomes not me to say.

I have marked this *independence of character* in the commons, with peculiar anxiety, where  
it

it authorized, and *obliged* them to disclaim the influence of their predecessors, to refuse their most consummate acts, either passed *without* the assent of the other estates, or *with* it, if to any conceivable extent short of the legislative power.

I have traced the same character as extending itself to orders of any kind;—even to orders for the support of their *privilege*, a point, in which their constituents, and the *next* house of commons have an equal interest:—orders, deliberately formed, and exerted with spirit, but either left incomplete, though in the minutest part of them, or incompletely executed. I have reminded the public, of that jealous constitution, that will not *suffer* the next house of commons, to disgrace their calling, by a confidence in these measures, taken up at the point of their interruption;—or if they were *in pœnam*, suffer the object of them to be touched\*.

\* The idea of a septennial change in the representatives, does not originate in the supposition of a national judgment, that will influence the *old* and the *new* alike; but in the direct reverse—in the policy of changing the men, by way of guard against their abuse of power. Minorities and majorities are often transposed by this general appeal to the elector, and the legatary interest of an impeachment against *Mr. Pitt*, if there had been such a measure, it would have been perfect ridicule to name, with a reference to this *organ of the people*, &c. at the opening of the last parliament.

I have



I have distinguished the *commons* in *parliament* from an *agent* of any kind, from an *attorney general* in particular, who may be displaced by a sudden breath of caprice, or of party, at least; and who is bound by the acts of his predecessor, because they are both of them treated as mere *agents* of the *king*, who has bound *himself* by the *words*, or the *acts* of his *agent*, for the time.

I have stated what appears to my understanding, the soundest argument that can be offered upon the *general principle*, as resulting from the *course* of *parliament*;—a variety of instances, amounting, in their number, and value, to a *general principle*;—“ that no chain of proceeding can be taken up, and continued, by  
 “ either house of the legislature, in a parliament  
 “ that is new, though in points of the most critical importance to the welfare, and safety of  
 “ the kingdom.”

I have traced the *admitted* rule as to *bills* which had passed *both* houses of parliament; and I have traced it, not as an *exception*, or as a technical rule, *stricti juris*, and with an obscure origin; but as a marked illustration of the *general principle*, which is raised upon many *other* instances of a similar nature; indeed, upon *all*,  
 this

this of impeachment alone excepted—if it is an exception.

I have argued as forcibly as I could, because it was in support of an honest opinion, from a *bill of attainder*, where the culprit of state is, in a peculiar degree, an object of natural punishment, where the commons unite a judicial to a legislative character, where the recourse to *bill*, proves it the *only* way to reach the culprit, for offences which may touch the vital security of the government. I asked, and I ask again, if *Mr. Hastings* had been a favourite minister of another sovereign, of *Charles the second*, for example; and if the *legislative trial* had lasted, as it might have done, for *three years*, what an easy task would the *admitted* constitution have put into the hand of that sovereign, just after the lords had passed the bill, to end the parliament, and close that proceeding for ever?

Having thus cleared my way, *first*, of the *general principles*, either as introductory guides to the debate, or, as bearing directly upon the constitutional sense of a depending impeachment,—I have *next* followed you into the *usage* of parliament, which is an admitted, and essential part of its *law*.

I have

I have adjusted here, the *onus probandi*; insisting, that as the continuance of impeachment *after evidence heard* by a former court of the peers, has *never happened in fact*; and as *any* continuance of it must be a perfect *anomaly*, with a reference to the *general principle*, it was for *them* who affirmed that continuance, to fill up this blank, by evidence of, at least, indirect, and collateral usage, whose analogy would reach the case before us.

I have touched upon the political argument of disabling a minister to elude an impeachment; and have reversed the hypothesis, by that of a king adverse to a popular culprit, a discarded minister for example, and at the head of a powerful opposition, in a corrupt house of commons;—the accuser tired, or frightened, by the popular clamour—the evidence closed on both sides—the dissolution of parliament by an obvious finesse ensuring his punishment at a future, and more *commodious* period, “ *with all* “ *appliances, and means to boot.*”

I have protested against the unequal, and partial justice, which is, in other words, no justice at all, of imputing to the commons an exemption from the human accidents of despotism, intrigue, and corruption;—but, giving the mo-

monopoly of those infirmities either to the sovereign, or his minister. Here, as in many other parts of the work, I have taken pride in the idea of a tempered authority, in which a mutual, and jealous vigilance against the abuse, or assumption of right, guards *all* the power of government, and is the best of all securities for the governed\*.

I have barely touched upon the analogies of law, in other, and, as they are called, *inferior* courts; because I knew, how shy the *layman* is (unless when he has *political* occasion for them) of these analogies, and because I really did not feel that I wanted them, unless where the most obvious good-sense annexed, and united them to the law of parliament, so as to make them in principle one and the same.

I have marked the necessity of consulting *precedents*, and of consulting them *deeply*; refusing the paradox which called itself by the name of “*privilege*;” and confined the inspection of *journals* to the house of commons, in which no *judicial precedent* could be found.

\* “ Pour qu’on ne puisse abuser du pouvoir il faut que dans la disposition des choses le pouvoir arrête le pouvoir.”

MONTESQUIEU.

I have

I have compared the two precedents of 1678 and 1685, summarily at first, but extended the enquiry as to both, into the character of the age in which those orders respectively issued.—I have examined historically, the actual view, and use of the order 1678, followed, and preceded by various acts of cruel injustice, levelled at the *Earl of Danby* in parliament. In short, I have proved, as I think at least, the whole system of those transactions political, and corrupt, or at the best, as having passed in times that could almost be described, “*flagrante bello.*”

I have met the *new* argument, *new* I mean, as facing the light, which has built *the order of 1678* upon a supposed analogy to that of 1673. The reader will judge for himself, upon this refined analogy, after the dissection of it which I have taken the liberty of presenting to his view.

I have discriminated the effect of impeachment upon the discretion of bail in “*the courts below*,” (as we, members of parliament, call them,) an effect, which has been argued as proving—“the continuance of impeachment, even in the eye of *law*, when parliament is no more.”—I have explained in what respect this right of bailing is *neutral*, and in what other

views it rather *injures* than *aids* the supposition of a “ *depending impeachment.*”

I have stated the case of *Blair*, and the catholic peers in 1690, with all the candour, and particularity, that could best enable the reader to form his own conclusion.

I have admitted the force of the argument, *as far as it goes*, resulting from the *order of 1701*, with a view to the *Duke of Leeds*; but I have limited the extent of it, by the natural effect of the *judicial acts* preceding it;—and I have, at least, as I hope, replaced the authority of those *judicial acts*, by *Lord Oxford's case*, upon the footing of its reference, and analogies.

I have made a short, but, I hope, superfluous apology, for that liberal, and useful profession, which I consider, (though few have gratified ingenuous ambition less in it than myself) as the most honourable part of my existence; and which, as a relation of *Lord Somers* told you, with as much truth as manliness—*gave to us the Revolution.*

I have next offered, and perhaps obtruded, an independent, as well as cordial testimony, to *your public spirit*—that of the minister—of the parliament—

parliament—and of the *age*—in this prosecution of *Mr. Hastings*. I have commended impeachments in general, with a zeal which I *felt*; but I have taken the liberty of adding, what I consider as the *demand* of an impeachment upon the accuser and the judge, in their *mode of conducting it*, with a view to the *national honor*, and even to the *political wisdom*, at stake in it.

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Forgive, Sir, this attempt at a general review of my own argument, contained in these letters to you; an attempt which I have made for the purpose of convincing, in a few words, those who are familiar to the debate, that I have taken up *most* of the topics, if not all of *them*, which had been pressed into the argument there; and, at the same time, in order to delineate what appears to me a correct method of treating the subject, in point of arrangement.

Your character, Sir, is really so eminent in fame of more kinds than one, that it would be a degree of impertinence for *me* to commend it.



On the other hand, there is nothing more disingenuous than violent, or unqualified praise: Though to expatiate on the faults of a celebrated person, is at once invidious, and mean. I hope it will be admitted, that I have treated your public name with respect ;—the obligations of the public to many of your efforts, with gratitude ;—and the purity of your intentions, in which I have always confided, with esteem: but without prejudice to that ingenuous freedom, which enables even *me* to oppose many of your sentiments, whether exemplified in your words, or in your conduct.

From the reader (if I *should* be read) I am the most anxious to obtain this comment upon my work ;—“ that I have written as I thought, “ and felt ;—that I have stated the adverse arguments to my own, with candour ;—that I “ have not been flippant against any of those “ with whom I have differed ;—or ill-tempered ; “ —or too confident in the result of my own enquiries.” If he should then tell me, “ that “ I have been fortunate enough to rescue the “ *minority* of December 23, 1790, from a current opinion of their distress for the want of “ liberal, or constitutional support ; and that I “ have opened the subject *fairly* to a dispassionate

“ sionate review ;”—I shall be overpaid for the time these enquiries have occupied, and for the painful solicitude of the mind engaged in them.

I have the honor to be,

S I R,

With infinite respect and esteem,

Your most obedient servant,

*GEORGE HARDINGE.*

BEDFORD-SQUARE,

4th *April*, 1791.

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